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August 2013-August 2014 Case Law on American Indians

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Cover Page Footnote

THOMAS P. SCHLOSSER. Mr. Schlosser represents Tribes in fisheries, timber, water, energy, cultural resources, contracting, tax and federal breach of trust. He is a director of Morisset, Schlosser, Jozwiak & Somerville, where he specializes in federal litigation, natural resources, and Indian tribal property issues. He is also frequently involved in tribal economic development and environmental regulation. In 1970s, Tom represented tribes in the Stevens' Treaty Puget Sound fishing rights proceedings. Tom has a B.A. from the University of Washington and a J.D. from the University of Virginia Law School. Tom is a founding member of the Indian Law Section of the Washington State Bar Association and also served on the WSBA Bar Examiners Committee. Tom is a frequent CLE speaker and moderates an American Indian Law discussion group for lawyers at <http://forums.delphiforums.com/IndianLaw/messages>. He is a part-time lecturer at the University of Washington School of Law. Case synopses are reprinted or derived from Westlaw with permission of Thomson-West. For purposes of this update, the presenter has revised the synopses.

AUGUST 2013-AUGUST 2014 CASE LAW ON AMERICAN INDIANS

Thomas P. Schollosser^{*}

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I. UNITED STATES SUPREME COURT

1. ***Michigan v. Bay Mills Indian Community, et al.***, No. 12–515, 134 S. Ct. 2024 (2014). State of Michigan brought an action to enjoin an Indian tribe from operating casino on land located outside its reservation that it had purchased with earnings from a congressionally established land trust. The district court granted a preliminary injunction, and the tribe appealed. The appellate court, 695 F.3d 406, vacated the injunction and remanded. Certiorari was granted. The Supreme Court, Justice Kagan, held that the suit was barred by tribal sovereign immunity. Affirmed.

II. OTHER COURTS

A. Administrative Law

2. ***California Valley Miwok Tribe v. Jewell***, No. 11–00160, 2013 WL 6524636, ___ F. Supp. 2d ___ (D.D.C. 2013). This matter was before the Court on cross motions for summary judgment. Plaintiffs, led by Yakima Dixie, claim to be members of the California Valley Miwok Tribe (Tribe). They challenged the August 31, 2011 final decision of Larry Echo Hawk, the Assistant Secretary of the Bureau of Indian Affairs (BIA) that reached the following conclusions: (1) the Tribe is a federally recognized tribe; (2) the BIA cannot compel the Tribe to organize under the IRA and will cease all efforts to do so absent a request from the Tribe; (3) the BIA cannot compel the Tribe to expand its membership and will cease all efforts to do so absent a request from the Tribe; (4) as of the date of the Decision, the Tribe’s entire citizenship consisted of Yakima, Burley, Burley’s two daughters, and Burley’s granddaughter; and (5) the November 1998 Resolution established a General Council comprised of all of the adult citizens of the Tribe, with whom BIA may conduct government-to-government relations.. Federal Defendants Sally Jewell, Secretary of the DOI, Michael Black, Director of BIA, and Larry Echo Hawk (collectively “the Federal Defendants”) opposed Plaintiffs’ motion and requested that the Court affirm the August 31, 2011 decision.

At the Court’s request, Intervenor–Defendant, another group of individuals who claimed to be members of the Tribe and who are led by Silvia Burley, filed a brief in support of the Federal Defendants’ summary judgment motion. The Court concluded that the Assistant Secretary erred when he assumed that the Tribe’s membership is limited to five individuals and further assumed that the Tribe is governed by a duly constituted tribal council, thereby ignoring multiple administrative and court decisions that express concern about the nature of the Tribe’s governance.

The Court granted Plaintiffs' motion for summary judgment that sought remand of the August 2011 Decision and denied the Federal Defendants' cross motion for summary judgment.

3. *Picayune Rancheria of Chukchansi Indians v. Henriquez*, No. CV–13–01917, 2013 WL 6903750 (D. Ariz. 2013); 25 U.S.C. § 4101 et seq.; 25 C.F.R. § 2.6. Before the court was defendants' motion to dismiss. The Chukchansi Indian Housing Authority (CIHA) is the housing entity of the Picayune Tribe of Chukchansi Indians (Tribe) established by tribal ordinance to operate the tribe's federally assisted housing programs. CIHA operates as a non-profit tribal corporation, governed by a Board of Commissioners appointed by the Tribal Council. CIHA administers annual block grants from the Southwest Office of Native American Programs (SWONAP) of the United States Department of Housing and Urban Development (HUD). The block grants are provided through the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), 25 U.S.C. § 4101 et seq., which requires that grants be paid by HUD "directly to the recipient for the tribe." Individuals authorized to receive the funds are given access to an automated Line of Credit Control System (LOCCS), and can access and withdraw NAHASDA funds through that system.

In January 2013, a leadership dispute arose among the members of the Tribal Council, and various members of the Tribal Council attempted to suspend other members. Three separate factions emerged from the leadership dispute, each claiming to represent the government of the Tribe. The BIA advised HUD that the intra-tribal dispute was currently the subject of an appeal and that, pursuant to 25 C.F.R. § 2.6, there was no final BIA determination regarding the appropriate tribal government. As a result, HUD informed CIHA, with copy to the heads of all three factions that, "all current LOCCS users are hereby prohibited from accessing LOCCS." HUD emphasized that it was not suspending the Tribe's funds, but rather revoking access to the LOCCS system, and that access by new users would be allowed if HUD became "satisfied that CIHA's Board of Commissioners is in fact authorized and designated by a recognized Tribal government." CIHA initiated a suit against HUD, SWONAP, and their respective representatives on behalf of itself and the Tribe.

The suit asserted that: (1) HUD suspended funds in violation of NAHASDA because it had not shown that CIHA failed to "comply substantially" with statutory requirements; (2) HUD's suspension of funding violated the Administrative Procedures Act because it was arbitrary, capricious and contrary to applicable law; (3) HUD violated Plaintiff's due process rights under the Fifth Amendment by failing to provide proper notice or hearing prior to revoking CIHA's access to LOCCS; (4) HUD violated federal common law by failing to acknowledge the elected tribal council at the last undisputed election; (5) Plaintiffs were entitled to declaratory relief regarding the recognition of tribal

court orders which recognized the Ayala faction as the lawful governing body of the Tribe; and (6) the government breached its fiduciary duty to the Tribe under NAHASDA. Plaintiff filed a motion for a temporary restraining order and a preliminary injunction, seeking to have access to LOCCS restored “for the CIHA officials who had that access on and before August 22, 2013.” Plaintiffs thus sought to have the Ayala faction granted exclusive access to the HUD funds.

The court found that Plaintiffs could not meet the burden of showing their injury by Defendants’ actions. The Court also opined that Plaintiff’s injury could not be redressed by a court order without asking the Court to resolve matters of intra-tribal governance. Plaintiffs therefore cannot show that they have standing to pursue this action. The Court found Plaintiffs’ arguments and authorities unpersuasive, and elected to follow cases that have dismissed similar claims.

The court granted Defendants’ motion to dismiss.

4. ***Alto v. Black***, No. 12–56145, 738 F.3d 1111 (9th Cir. 2013). Descendants of Indian tribal members filed suit seeking declaratory and injunctive relief from the Bureau of Indian Affairs’ (BIA) order upholding the tribe’s decision to disenroll descendants from tribal membership. After granting intervention by the tribe to file jurisdictional motions and after granting the descendants’ motion for preliminary injunction, preventing enforcement of the disenrollment order, pending completion of litigation, the District Court, 2012 WL 2152054, denied the tribe’s motion to dissolve the preliminary injunction and the tribe’s motions to dismiss, for failure to join the tribe as the required party and for lack of subject matter jurisdiction. Tribe appealed. The appellate court held that: (1) descendants’ challenges to disenrollment order were reviewable, and (2) tribe was not a required party. Affirmed in part, dismissed in part, and remanded.

5. ***Hester v. Jewell***, No. 13–4142, 2014 WL 211868, __ Fed. Appx. __ (10th Cir. 2014). Job applicant brought a pro se Title VII action against the Secretary of the Department of Interior (DOI) and Department officials. The District Court, 2013 WL 5322625, dismissed *sua sponte*, and the applicant appealed. The appellate court held that the application of Indian Preference to job postings within the DOI was not racial discrimination under Title VII. Affirmed.

6. ***Nambe Pueblo Housing Entity v. United States Dep’t of Housing and Urban Dev.***, No. 11–CV–01516, 2014 WL 901511 (D. Colo. 2014). (From the opinion.) This action is one of several related actions pending in this court involving challenges to HUD’s reductions of the plaintiffs’ Indian Housing Block Grant (IHBG) awards pursuant to 24 C.F.R. § 1000.318 and HUD’s authority to recapture purported grant overfunding. The procedural history of the plaintiffs’ challenges to HUD’s elimination of Mutual Help

units from their Formula Current Assisted Stock (FCAS) is described in this court's Memorandum Opinion dated August 31, 2012 in *Fort Peck Housing Authority v. HUD et al.*, Civil Action No. 05-cv-00018-RPM, which was also made applicable in this civil action. This action is unique because Nambe Pueblo Housing Entity (Nambe) filed this action in 2011, after the Native American Housing and Assistance and Self-Determination Act of 1996 (NAHASDA) was amended by the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, Pub. L. No. 110-411, 122 Stat. 4319 (the "Reauthorization Act").

The court found that HUD's disallowance of FCAS funding for 23 units was arbitrary and capricious, explaining that those units could not have been conveyed to the homebuyers due to a title impediment created by the failure of the Bureau of Indian Affairs (BIA) to record a master lease for the projects where the units are located. The court ruled that the amended version of NAHASDA governs this action because the agency actions challenged in this suit occurred after the effective date of the 2008 amendments.

The court also found and concluded that with respect to FCAS funding for FY 2006, HUD lacked recapture authority because HUD did not "take action" within the 3-year limitation provided by 24 C.F.R. § 1000.319. It is FURTHER ORDERED that on or before April 15, 2014, Plaintiff Nambe Pueblo Housing Entity shall submit a proposed form of judgment, specifying the amounts to be paid to it and the asserted sources of the payment; and it is FURTHER ORDERED that if Plaintiff Nambe Pueblo Housing Entity claims entitlement to payment for underfunding because HUD excluded those units from its FCAS in a particular year, the proposed form of judgment should include a separate itemization for those amounts, which may be submitted by May 15, 2014. The Plaintiff's request for attorney's fees and costs will be addressed after entry of judgment.

7. *Tlingit-Haida Regional Housing Authority v. United States Department of Housing and Urban Development*, No. 08-cv-00451, 2014 WL 2781728 (D. Colo. Jun 19, 2014). On March 4, 2008, Plaintiff Tlingit-Haida Regional Housing Authority (Tlingit-Haida or Tribe) filed an action for judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, claiming that the Defendants (collectively "HUD") violated the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), 25 U.S.C. § 4101 *et seq.*, by reducing the number of housing units counted as Formula Current Assisted Stock (FCAS) for the calculation of the Tribe's share of the annual Indian Housing Block Grant (IHBG) and recapturing IHBG funds which the Tribe had received in past years for those units. This action is governed by the version of NAHASDA that existed before it was amended by the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, Pub. L. No. 110-411, 122 Stat. 4319 (2008).

Legal issues common to this action and related actions were determined in two previous memorandum opinions and orders in *Fort Peck Housing Authority v. HUD et al.*, Civil Action No. 05–cv–00018–RPM, dated August 31, 2012, and March 7, 2014.

Tlingit–Haida has established its right to an affirmative injunction requiring HUD to restore to it the amount of \$1,139,658. Final judgment was entered requiring the Defendants to restore to Plaintiff Tlingit–Haida Regional Housing Authority the amount of \$1,139,658, for Indian Housing Block Grant funds that were illegally recaptured from the Plaintiff for fiscal years 1998 through 2002. Any such restoration shall be in addition to the full IHBG allocation that would otherwise be due to the Plaintiff under the Native American Housing Assistance and Self–Determination Act (“NAHASDA”) in a given fiscal year as calculated without application of the amount of the Judgment.

8. *Choctaw Nation of Okla. v. United States Dep’t of Housing and Urban Dev.*, No. 08–cv–02577, 2014 WL 2883456 (D. Colo. 2014). On November 25, 2008, Plaintiffs Choctaw Nation of Oklahoma and the Housing Authority of the Choctaw Nation of Oklahoma (collectively, Choctaw or the Tribe) filed this action for judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, claiming that the Defendants (collectively HUD) violated the Native American Housing Assistance and Self–Determination Act of 1996 (“NAHASDA”), 25 U.S.C. § 4101 *et seq.*, by reducing the number of housing units counted as Formula Current Assisted Stock (FCAS) for the calculation of the Tribe’s share of the annual Indian Housing Block Grant (IHBG) and recapturing IHBG funds which the Tribe had received in past years.

This action is governed by the version of NAHASDA that existed before it was amended by the Native American Housing Assistance and Self–Determination Reauthorization Act of 2008, Pub. L. No. 110–411, 122 Stat. 4319 (2008). Legal issues common to this action and related actions were determined in two previous memorandum opinions and orders in *Fort Peck Housing Authority v. HUD et al.*, Civil Action No. 05–cv–00018–RPM, dated August 31, 2012, and March 7, 2014. Choctaw has established that it is entitled to restoration of the recaptured funds in the amount of \$841,316.00.

Defendants shall restore to Plaintiffs Choctaw Nation of Oklahoma and Housing Authority of the Choctaw Nation of Oklahoma (“Plaintiff Choctaw”) the amount of \$841,316.00. Any such restoration shall be in addition to the full IHBG allocation that would otherwise be due to Plaintiff Choctaw under the Native American Housing Assistance and Self–Determination Act (“NAHASDA”) in a given fiscal year as calculated without application of the amount of the Judgment.

9. *Akiachak Native Cmty. v. Jewell*, No.: 06–0969, 2014 WL 2885910 __ F. Supp. 2d __ (D.D.C. 2014). This case involved a challenge by certain Alaskan Native

Tribes (Tribes) to a regulation promulgated by the Secretary of the Interior (Secretary) regarding taking land into trust on behalf of all Indian Tribes, 25 C.F.R. § 151.1, pursuant to § 5 of the Indian Reorganization Act, 25 U.S.C. § 465. Pending before the court was the State of Alaska's ("Alaska") Motion for a Stay and Injunction pending appeal of the Court's September 30, 2013 Order in the D.C. Circuit. The Court concluded on March 31, 2013, the Alaska exception within the rule was arbitrary and capricious and violated the Indian Reorganization Act (IRA), 25 U.S.C. § 476(g).

The case is currently on appeal in the D.C. Circuit. Meanwhile, on April 30, 2014, the Bureau of Indian Affairs published a Proposed Rule, proposing to formally remove the Alaska exception from 25 C.F.R. § 151.1, and begin considering the acquisition of lands into trust on behalf of Alaska Native Tribes and individuals. In this case, Alaska filed a motion for a Stay and Injunction pending appeal. Alaska specifically asked this Court to stay its September 30, 2013 Order and to "enjoin the Secretary's rulemaking activities, including accepting comments on the recently proposed rule, and enjoin the Secretary from accepting and processing applications to take land into trust for Alaska tribes, pending resolution of the appeal."

The court granted Alaska's motion for stay and injunction pending appeal in part, denied in part, and enjoined the Secretary of the Interior from taking land into trust in Alaska (except for the Metlakatla Indian Community of the Annette Island Reserve or its members) until the D.C. Circuit issues a ruling and mandate resolving Alaska's appeal.

10. *Navajo Housing Auth. v. United States Dep't of Housing and Urban Dev.*, No. 08–CV–00826, 2014 WL 2936924 (D. Colo. 2014). On April 22, 2008, Plaintiff Navajo Housing Authority (Navajo or Tribe) filed an action for judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, claiming that the Defendants (collectively "HUD") violated the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), 25 U.S.C. § 4101 *et seq.*, by reducing the number of housing units counted as Formula Current Assisted Stock (FCAS) for the calculation of the Tribe's share of the annual Indian Housing Block Grant (IHBG) and recapturing IHBG funds which the Tribe had received in past years. Defendants shall restore to Plaintiff Navajo Housing Authority the amount of \$6,165,842 for Indian Housing Block Grant ("IHBG") funds that were illegally recaptured from Plaintiff Navajo. Any such restoration shall be in addition to the full IHBG allocation that would otherwise be due to the Plaintiff under the Native American Housing Assistance and Self-Determination Act (NAHASDA) in a given fiscal year as calculated without application of the amount of the Judgment.

11. *Alabama-Coushatta Tribe of Tex. v. United States*, No. 13-40644, 2014 WL 3360472 (5th Cir. 2014). Tribe brought suit against the United States and various

federal agencies, alleging that issuance of drilling leases and permits on land violated the Administrative Procedure Act and federal common law. The government moved to dismiss for lack of subject matter jurisdiction. The District Court, 2013 WL 1279033, adopted the report and recommendation of Roy S. Payne, United States Magistrate Judge, 2013 WL 1279051, and granted the motion to dismiss. Tribe appealed. The Court of Appeals held that federal court lacked subject matter jurisdiction over Tribe's claims. Affirmed.

B. Child Welfare Law And ICWA

12. *Thompson, et al. v. Fairfax Cnty. Dept. of Family Services, et. al*, Nos. 2185-12-4, 2232-12-4, 2217-12-4, 2216-12-4, 2013 WL 4799747 (Va. Ct. App. 2013). County Department of Family Services filed a petition to terminate parental rights of both parents of an Indian child. The Circuit Court held that the guardian ad litem and foster parents had not established good cause to retain jurisdiction and ordered the case transferred to tribal court, but granted a stay pending appeal. The guardian ad litem and foster parents appealed, and parents appealed an order granting stay. The appellate court held that: (1) the appropriate standard of review was an abuse of discretion; (2) existing Indian family exceptions would not be adopted; (3) the tribal court had jurisdiction over both parents; (4) the best interests of the child were relevant in considering the transfer; (5) the proceedings were not at an advanced stage; and (6) the transfer would not cause undue hardship to parties. Reversed and remanded.

13. *In the Matter of E.G.M.*, No. 13-584, 2013 WL 5913807 (N.C. Ct. App. 2013). County department of social services (DSS) filed a petition alleging the child was a neglected juvenile and was subject to the Indian Child Welfare Act (ICWA). The district court granted legal custody of the child to DSS, ordered child's continued placement with family friend, established a plan of reunification with mother, and relieved DSS of further efforts towards reunification with father. Mother and father appealed.

The appellate court held that: (1) remand was required to provide for a redetermination of the trial court's subject matter jurisdiction over neglect proceeding involving an Indian child; (2) the Court of Appeals could not take judicial notice of memorandum of agreement (MOA) Indian tribe and DSS signed; (3) qualified expert testimony which would continue custody of the Indian child, by the parent or Indian custodian, was likely to result in serious emotional or physical damage to the child, was to be introduced at the hearing which resulted in foster care placement of the Indian child; and (4) as a matter of first impression, a trial court may order the cessation of reunification efforts in Indian Child Welfare Act cases if the court finds that such efforts would clearly be futile. Vacated and remanded.

14. *In re Autumn K. v. Patricia M.*, No. A136586, 2013 WL 6092859, __ Cal. Rptr. 3d __ (Cal. Ct. App. 2013). County Health and Social Services Department commenced child dependency proceeding, alleging jurisdiction based on parents' substance abuse problems, and the Indian tribe intervened. Following the termination of reunification services, the Superior Court denied the maternal grandmother's request to be designated as a de facto parent, denied the mother's request for reinstatement of reunification services, terminated parental rights, and ordered adoption as permanent plan. Both parents appealed. The appellate court held that: (1) grandfather's misdemeanor conviction for contributing to the delinquency of a minor was not a non-exemptable offense; (2) the Department was required by statute to evaluate the maternal grandfather's request for exemption to allow placement of Indian child in the grandparents' home; (3) the tribal custody forms, which the mother and grandmother executed upon child's birth, did not grant the grandmother custody over the Indian child; and (4) the court did not improperly apply the existing Indian family doctrine. Reversed and remanded.

15. *Dep't of Health and Human Services v. J.G.*, Nos. 0400574JV4; 0900378M; A153864, 2014 WL 25206 (Or. Ct. App. 2014). Department of Human Services moved to appoint Indian child's current foster parent as the child's legal guardian. The Circuit Court granted motion. Mother appealed. The appellate court held that: (1) as a matter of first impression, a section of the Indian Child Welfare Act (ICWA) allowing any court of competent jurisdiction to invalidate foster care actions that contravened ICWA was in conflict with the state appellate rule requiring the preservation of claim of error to raise error on appeal, and therefore the ICWA section preempted state rule; (2) durable guardianship established by trial court was a foster care placement as could require the court to make a finding under the ICWA as to whether active efforts had been made to prevent breakup of Indian family; but (3) in instant action, court was not required to make an active effort finding in guardianship judgment. Affirmed.

16. *In re Jayden D. and Dayten J.*, No. A-13-193, 2014 WL 116032 (Neb. Ct. App. 2014). (*From the Opinion*) "Yolanda W., formerly known as Yolanda O., appeals from the decision of the separate juvenile court of Lancaster County, which denied her motion to transfer the termination of parental rights proceeding in this juvenile case to tribal court. Because we find that the State failed to establish good cause to deny the transfer, we conclude that the juvenile court abused its discretion in denying the motion to transfer."

17. *Oglala Sioux Tribe v. Van Hunnik* Civ. 13-5020-JV, 2014 WL 317693, 2014 WL 317657 (D.S.D. 2014). Native American tribes and several tribe members brought § 1983 action against state officials, alleging policies, practices, and procedures

relating to the removal of Native American children from their homes during 48-hour hearings, violated the Fourteenth Amendment's due process clause and the Indian Child Welfare Act (ICWA). Defendants moved to dismiss. The District Court held that: (1) Younger abstention did not apply; (2) Rooker-Feldman abstention doctrine did not deprive district court of subject matter jurisdiction; (3) tribes had *parens patriae* standing; (4) allegations were sufficient to plead judge and officials were policymakers; (5) ICWA provision provided substantive rights; (6) allegations were sufficient to state a claim for ICWA violations; and (7) allegations were sufficient to plead denial of their Fourteenth Amendment due process rights. Motions denied.

18. *In the Matter of Abbigail A.*, No. C074264, 2014 WL 2705177 (Cal. Ct. App. 2014). The county department of health and human services filed dependency petitions as to two children. The Superior Court directed counsel to make reasonable efforts to enroll the children and their father in a tribe which had notified the court that they were eligible for membership, concluded it was required to treat the eligible minors as Indian children under Indian Child Welfare Act (ICWA), but made jurisdictional findings and placed the children in the custody of their maternal grandmother. The appellate court held that court rules extending ICWA protections to children merely eligible for tribal membership are invalid. Reversed with directions.

19. *In re I.P. v. M.P.*, No. E060213, 226 Cal. App. 4th 1516 (Cal. Ct. App. 2014). Children and Family Services (CFS) filed a dependency petition alleging that the child, age four, came within the jurisdiction of the juvenile court. Indian tribe responded indicating that the child was eligible for membership and that the tribe was intervening. The Superior Court found that the child was adoptable and terminated parental rights, and also found, *inter alia*, that CFS had complied "with the noticing requirements" of the Indian Child Welfare Act (ICWA). Mother appealed. The appellate court held that the mother failed to show a reasonable probability that compliance with the procedural requirements of tribal customary adoption would have resulted in an outcome more favorable to her. Affirmed.

20. *In re Interest of Mischa S.*, No. A-13-265, 22 Neb. App. 105, __ N.W. 2d __ (Neb. Ct. App. 2014). State filed a petition to have a child adjudicated as lacking proper parental care. Parents, one of whom was member of Indian tribe, entered a no contest admission to petition, and the child was allowed to remain at home, under supervision. Guardian ad litem (GAL) subsequently moved to remove child from home. Following a hearing, the County Court ordered the child to be placed in foster care and declared a provision of the Nebraska Indian Child Welfare Act (ICWA) unconstitutional. Parents appealed.

The appellate court held that: (1) there was not clear and convincing expert evidence that serious emotional damage would result if child, who became subject of original adjudication petition because of excessive school absences, were not removed from parents' home, as required for foster care placement under Nebraska Indian Child Welfare Act (ICWA); (2) juvenile court's sua sponte determination, that provision of Nebraska Indian Child Welfare Act (ICWA) was unconstitutional as applied, was void; and (3) in proceedings under the Nebraska ICWA for foster placement of, or termination of parental rights to, an Indian child, proof by a preponderance of the evidence is the standard for satisfying the court of active efforts to prevent the breakup of Indian family. Reversed and remanded.

21. *In re Alexandria P.*, No. B252999, 2014 WL 4053054, __ Cal. Rptr. 3d __ (Cal. Ct. App. 2014). (From the opinion.) This case involved the placement preferences set forth in the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 *et seq.*). At issue is whether the dependency court properly applied the ICWA in finding that the foster parents of an Indian child failed to prove good cause to deviate from the ICWA's adoptive placement preferences. A 17-month-old Indian child was removed from the custody of her mother, who has a lengthy substance abuse problem and has lost custody of at least six other children, and her father, who has an extensive criminal history and has lost custody of one other child. The girl's father is an enrolled member of an Indian tribe, and the girl is considered an Indian child under the ICWA. The tribe consented to the girl's placement with a non-Indian foster family to facilitate efforts to reunify the girl with her father. The girl lived in two foster homes before she was placed with de facto parents at the age of two. She bonded with the family and has thrived for the past two and a half years. After reunification efforts failed, the father, the tribe, and the Department of Children and Family Services (Department) recommended that the girl be placed in Utah with a non-Indian couple who were extended family of the father. De facto parents argued good cause existed to depart from the ICWA's adoptive placement preferences and it was in the girl's best interests to remain with de facto family. The child's court-appointed counsel argued that good cause did not exist.

The court ordered the girl placed with the extended family in Utah after finding that the de facto parents had not proven by clear and convincing evidence that it was a certainty the child would suffer emotional harm by the transfer. De facto parents also contend that the ICWA's adoptive placement preferences do not apply when the tribe has consented to a child's placement outside of the ICWA's foster care placement preferences. The court disagreed with their interpretation of the statutory language. De facto parents further contend that the court erroneously applied the clear and convincing standard of proof, rather than a preponderance of the evidence, a contention we reject based upon the overwhelming authority on the issue.

Finally, the de facto parents contend that the court erroneously interpreted the "good cause" exception to the ICWA's adoptive placement preferences as requiring proof of a certainty that the child would suffer emotional harm if placed with the Utah couple, and failed to consider the bond between Alexandria and her foster family, the risk of detriment if that bond was broken, and Alexandria's best interests. The court agreed with this last contention and reversed the placement order because the court's error was prejudicial. The order transferring custody of the minor to the R.s was reversed. The cause was remanded to determine if good cause existed to deviate from the ICWA's adoptive placement preferences.

22. *In re Candace A.*, No. S-15251, 2014 WL 4160043, __ P.3d __ (Alaska 2014). The superior court adjudicated Candace, a child in need of aid, because she had been sexually abused by her adoptive brother. The Superior Court nonetheless ordered that Candace be returned to her parents' home, holding that the Department of Health and Social Services, Office of Children's Services (OCS), had failed to present "qualified expert testimony" as required by the Indian Child Welfare Act (ICWA) to support a finding that she would likely suffer serious physical or emotional harm in her parents' custody. The Superior Court held an adjudication hearing to determine whether Candace was a child in need of aid and whether removal from her family home could be justified. OCS called Barbara Cosolito to provide the expert testimony. ICWA was required to show "that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child." The Bureau of Indian Affairs (BIA) had defined the ICWA phrase "qualified expert witnesses" to include lay persons with "substantial experience and knowledge regarding relevant Indian social and cultural standards" and "professional persons" who have "substantial education in the area of [their] specialty." It was against these BIA standards that the Superior Court judged the qualifications of OCS's proposed experts. Social work in Alaska has all the earmarks of a profession. The law requires a state license for the practice of social work. A licensed clinical social worker must have a master's or doctoral degree in social work, must have completed at least two years of continuous full-time employment in post-graduate clinical social work, must have good moral character and be "in good professional standing," must provide "three professional references" acceptable to the licensing board, and must pass the licensing examination. Social workers are subject to a code of ethics, including confidentiality requirements, and must maintain their licenses by continuing education courses, including "professional ethics." Social workers who do not conform to "minimum professional standards" are subject to discipline. Alaska statutes and rules reflect a common understanding that social workers are professionals. And in our case law, we have strongly implied that social workers may be qualified experts under the third BIA guideline as long as they have "expertise beyond the normal social worker qualifications."

The Supreme Court reversed the Superior Court's rulings on whether OCS's two proffered witnesses were qualified experts for purposes of 25 U.S.C. § 1912(e); vacated the portion of the adjudication order placing Candace with her parents; and remanded for further proceedings consistent with this opinion.

C. Contracting

23. *Healy Lake Village v. Mt. McKinley Bank*, No. S-14987, 2014 WL 1408554, __ P.3d __ (Alaska 2014). Tribal members who claimed to constitute newly elected tribal councilmen brought a declaratory judgment action against a bank to determine who was authorized to act on behalf of the tribe and to access the tribe's accounts. A second group of tribal members who claimed to represent the tribe based on a competing election was granted intervention to challenge the Superior Court's jurisdiction. The Superior Court dismissed for lack of jurisdiction, and the members who brought the initial action appealed. The Supreme Court held that: (1) the Superior Court did not commit reversible error by failing to convert bank's motion to dismiss to a motion for summary judgment; (2) any inquiry into the legitimacy of competing tribal elections was solely within tribe's retained inherent sovereignty; and (3) the Superior Court lacked subject matter jurisdiction over tribal member's declaratory judgment action against bank. Affirmed.

D. Employment

24. *South v. Lujan*, No. 32,015, 2014 WL 3908038, __ P.3d __ (N.M. Ct. App. 2014). Plaintiff-Appellant Tiffany South, a former officer with the Sandia Pueblo Police Department, (Plaintiff) filed a complaint for violation of the New Mexico Human Rights Act (NMHRA), retaliatory discharge, and tortious interference with contract against Defendants-Appellees Isaac Lujan, William Duran, and Mary-Alice Brogdon (collectively, Defendants) in their individual capacities. The district court granted Appellees' motion to dismiss based on lack of jurisdiction. Plaintiff, who had been an officer with the Sandia Pueblo Police Department (the Department), alleged that Defendants Lujan and Duran, the Chief and Captain of the Department, respectively, had sexually harassed her and that, together with Defendant Brogdon, the employee relations manager for Sandia Pueblo, had retaliated against her after she complained of the sexual harassment. She also maintained that the Defendants interfered with her employment contract with Sandia Pueblo "with the explicit motive of terminating [her employment] for false reasons[.]"

Plaintiff is not Indian. Defendant Lujan is Indian and a member of the Pueblo. Defendants Duran and Brogdon are neither Indian nor members of the Pueblo. Sandia Pueblo is not named as a party in the complaint. Defendants moved for dismissal of the complaint, arguing that the NMHRA did not apply to the Pueblo and its employees and

that Plaintiff's claims were barred by the Pueblo's sovereign immunity and, therefore, the District Court lacked jurisdiction to hear the complaint. They also argued that the suit must be dismissed because the Pueblo is a necessary party to the suit, which cannot be joined. After a hearing, the District Court granted the Defendants' motion and dismissed the complaint with prejudice. Plaintiff appealed.

The overarching question presented- does the state court have subject matter jurisdiction over these claims?-depended on the answers to a number of components: including whether the conduct complained of occurred on the reservation, whether the conduct complained of occurred within the scope of employment, whether the Pueblo is a necessary party, and to what extent the Pueblo has sought to regulate disputes between its employees when employees are sued in tort in their individual capacities.

Here, there are two important issues that are inadequately developed for review. The first is whether the Defendants' alleged conduct occurred within the scope of employment by the Pueblo. The second issue is whether state court jurisdiction would infringe on the Pueblo's sovereignty under the facts of this case. Being no factual basis for the District Court's ruling in the record, the Court reversed and remanded the case to the District Court for further proceedings consistent with this Opinion.

E. Environmental Regulations

25. *Oneida Tribe of Indians of Wis. v. Village of Hobart, Wis.*, No. 12 3419, 2013 WL 5692337 (7th Cir. 2013). An Indian tribe filed action seeking a declaratory judgment that the village lacked authority to impose charges under its storm water management utility ordinance on parcels of land held in trust by the United States for the tribe located on reservation and within village. The tribe also sought injunctive relief enjoining the village from attempting to enforce its ordinance upon tribal lands. The tribe filed motion for summary judgment. The United States filed a motion for summary judgment on village's third-party complaint against the United States, alleging that the United States, as holder of the bare title to the tribal trust lands, had to pay the storm water fees if the tribe was not responsible for doing so. The District Court, 891 F. Supp. 2d 1058, granted motions. Village appealed. The appellate court held that: (1) the Clean Water Act (CWA) did not authorize village to impose storm water management charges upon property held in trust for the benefit of Indian tribe; (2) the village's storm water management charges constituted an impermissible tax upon tribal trust property; and (3) the United States was not obligated to pay storm water management taxes imposed by village upon tribal lands. Affirmed.

26. *Okla. Dept. of Env'tl. Quality v. E.P.A.*, No. 11-1307, 740 F.3d 185 (D.D.C. 2014). Oklahoma Department of Environmental Quality petitioned for review of final rule promulgated by the Environmental Protection Agency (EPA) under the Clean

Air Act (CAA), which established a federal implementation plan for the attainment of national air quality standards in Indian country. The Appellate Court held that: (1) Oklahoma had standing to bring petition; (2) Oklahoma's petition was not time-barred; (3) Oklahoma did not forfeit its claim that state implementation plan presumptively applied in non-reservation Indian country; and (4) EPA had no authority under the CAA to issue the rule. Petition granted.

27. *HonoluluTraffic.com v. Federal Transit Admin.*, No. 13-15277, 2014 WL 607320, __ F.3d __ (9th Cir. 2014). Consortium of interest groups and individuals opposing high-speed rail project filed action against Federal Transit Administration (FTA), Department of Transportation (DOT), municipality, and various federal and local administrators asserting challenges under National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA), and Department of Transportation Act. The District Court, 2012 WL 5386595, entered summary judgment in the defendants' favor on most claims, but enjoined construction of the project's fourth phase pending remand to agency. Plaintiffs appealed. The Appellate Court held that: (1) district court's order was final reviewable decision; (2) statement of purpose in project's final environmental impact statement (FEIS) did not unreasonably restrict project's purpose and need; (3) FEIS adequately considered alternatives; (4) FTA's finding that managed lanes alternative (MLA) and bus rapid transit alternatives were not prudent was not arbitrary or capricious; and (5) FTA and city were not required to complete their identification and evaluation of Native Hawaiian burial sites before approving project. Affirmed.

28. *Public Employees for Env'tl. Responsibility v. Beaudreu*, Nos. 10-1067, 10-1073, 10-1079, and 10-1238, 2014 WL 985394, __ F. Supp. 2d __ (D.D.C. 2014). In consolidated cases, individuals and environmental groups brought interrelated claims concerning several administrative decisions made by federal agencies approving construction of various aspects of offshore wind energy project in Nantucket Sound. Wind energy contractor intervened, and parties moved and cross-moved for summary judgment. The District Court held that: (1) Coast Guard's terms and conditions for project were reasonable under Coast Guard and Maritime Transportation Act of 2006; (2) United States Bureau of Ocean Energy Management (BOEM) did not violate Outer Continental Shelf Lands Act; (3) Endangered Species Act (ESA) required United States Fish and Wildlife Service (FWS) to independently make determination to discard operational adjustment; (4) biological opinion of National Marine and Fisheries Service (NMFS) was not arbitrary and capricious; (5) NMFS violated ESA by failing to include incidental take statement concerning North Atlantic right whales in its biological opinion; (6) NMFS appropriately considered project's potential impact on listed sea turtles; (7) Migratory Bird Treaty Act did not require BOEM to obtain FWS permit to take migratory birds prior to approving project; (8) BOEM appropriately conducted consultation process under National Historic Preservation Act;

(9) BOEM's final environmental impact state (EIS) was not arbitrary and capricious; and (10) BOEM was not required to prepare new or supplemental EIS. Motions granted in part and denied in part.

29. *Te-Moak Tribe of Western Shoshone Indians of Nevada v. U.S. Dept. of the Interior*, No. 12-15412, 2014 WL 1244275 (9th Cir. 2014). Indian tribes brought action challenging Bureau of Land Management's (BLM) approval of mining project on federal land, alleging violations of Federal Land Policy and Management Act (FLPMA) and National Environmental Policy Act (NEPA). Project owner intervened. The District Court, 2012 WL 13780, granted summary judgment in favor of BLM and project owner. Tribes appealed. The Appellate Court held that: (1) BLM did not act arbitrarily or capriciously when it determined further accommodation of Indian tribes' religious use of pediment area of piñon-juniper groves at base of mountain in project area was not practicable, and (2) BLM did not act arbitrarily or capriciously in analyzing project's impacts on water resources. Affirmed.

30. *El Paso Natural Gas Co. v. United States*, Nos. 12-5156, 12-5157, 2014 WL 1328164 (D.D.C. 2014). The natural gas company brought action against the United States and other federal entities, alleging failure to fulfill obligations under Uranium Mill Tailings Radiation Control Act (UMTRCA), Resource Conservation and Recovery Act (RCRA), and Administrative Procedure Act (APA) in connection with certain properties alleged to be contaminated with residual radioactive waste. The Indian tribe intervened, asserting claims under UMTRCA and federal and tribal law. Defendants moved to dismiss. The District Court, 774 F. Supp. 2d 40 and 847 F. Supp. 2d 111, granted motions. Defendants appealed. The Appellate Court held that: (1) Comprehensive Environmental Resources, Compensation, and Liability Act (CERCLA) barred court's jurisdiction over RCRA claims related to landfill site; (2) dismissal of RCRA claims under CERCLA should have been without prejudice; (3) tribe's RCRA claims in relation to other site were not moot; (4) as matter of first impression, governmental agencies are persons entitled to bring citizen suits under RCRA; (5) UMTRCA did not preclude judicial review of tribe's APA claims; (6) tribe failed to state "failure to act" claims under APA; and (7) tribe did not have cause of action against United States for breach of trust duties. Affirmed in part, reversed in part, and remanded.

31. *Confederated Tribes and Bands of Yakama Nation v. U.S. Fish and Wildlife Serv.*, No. 1:14-CV-3052, 2014 WL 1778391, __ F. Supp. 2d __ (E.D. Wash. 2014). Before the court was plaintiff's motion for a temporary restraining order. This case concerns guided bus tours for members of the general public on Rattlesnake Mountain in the Hanford Reach National Monument conducted by Defendant United States Fish and Wildlife Services ("USFWS"). Plaintiff Confederated Tribes and Bands

of the Yakama Nation (“the Yakama Nation”) sought judicial review of the USFWS’s agency decision and actions that the guided tours will have no adverse effect on the site, which has been designated a Traditional Cultural Property (TCP) under the National Historic Preservation Act (NHPA). Rattlesnake Mountain, overlooking the Hanford Site in Benton County, Washington, is known to the Yakama Nation as Laliik, and means “standing above the water.”

Laliik has cosmological, religious, and cultural significance for the Yakama Nation and other Indian tribes. The Yakama Nation ceded the land on which Laliik is situated to the United States under the Treaty of 1855. In 2007, Laliik was designated as a Traditional Cultural Property (TCP) pursuant to § 101(d)(6)(A) of the NHPA. A TCP is a “property of traditional religious and cultural importance to an Indian tribe” and is thereby eligible for listing on the National Register of Historic Places. USFWS issued a finding that the wildflower tours presented “no adverse effect” on the Laliik TCP. State Historic Preservation Officer Allyson Brooks notified the USFWS that she did not concur with the finding of no adverse effect. USFWS informed the Tribe that it would have the Advisory Council on Historic Preservation review the new proposal because the Tribe and the State Historical Preservation Office had not concurred with the USFWS. The Tribe told the ACHP that it did not concur with the new tours proposal. The ACHP recommended to USFWS that it consult further with the Tribe prior to any further wildflower tours on the Laliik TCP, citing the allegedly unfollowed work controls and the Tribe’s belief that there was an adverse effect. The Yakama Nation was told that the USFWS had made a final agency decision to proceed with eight wildflower tours and then filed its complaint. After the first two days of tours occurred, the Tribe moved the Court for a temporary restraining order prohibiting the tours scheduled for May 8 and 10, 2014.

The Court found that the record before the Court does not support the issuance of such a “drastic remedy” as a TRO provides and denied Plaintiff’s Motion for a Temporary Restraining Order.

32. *WaterLegacy Advocacy v. U.S. E.P.A.*, No. 13–1323, 2014 WL 2462852 (D. Minn. 2014). Non-profit environmental organizations and Indian tribes brought action for declaratory judgment and injunctive relief pursuant to the Clean Water Act (CWA) and the Administrative Procedure Act (APA), challenging Environmental Protection Agency’s (EPA) approval of a water quality standards variance for a commercial-scale iron nugget production facility. EPA filed unopposed motion to vacate its approval of variance and remand the matter to the agency for further consideration, and facility owner moved to intervene. The District Court held that: (1) facility owner was not required to specify whether it sought intervention as a plaintiff or defendant in motion to intervene; (2) intervention motion was not moot; (3) timeliness factors

weighed in favor of intervention of facility owner; and (4) district court would not vacate EPA's approval of variance on remand to agency for further consideration. Motions granted.

33. *Nat'l Wildlife Fed'n, et al. v. Dep't Of Environmental Quality*, No. 307602, 2014 WL 3928563, __ N.W. 2d __ (Mich. Ct. App. 2014). Appellants appealed by leave granted from the circuit court's order affirming the decision of the Department of Environmental Quality (DEQ) to grant a mining permit to the Kennecott Eagle Minerals Company. At issue is appellee Kennecott Eagle's proposal to develop an underground mine to extract nickel and copper from the sulfide ores beneath the headwaters of the Salmon Trout River. The Keweenaw Bay Indian Community intervened in this case over its concerns over the impacts of mining operations on the cultural traditions associated with Eagle Rock. Appellees objected to further development of this issue below on the ground that appellants had stipulated to limit such advocacy to the issue of the Keweenaw Bay Indian Community's standing to intervene. The ALJ, however, reached the issue on its merits, and determined that further findings were in order. The DEQ's final decision-maker, however, alternatively concluded that a stipulation kept the issue off the table, and that "place of worship" for purposes of Rule 425.202(2)(p) referred to buildings for human occupancy, not purely outdoor locations. The circuit court in turn affirmed the DEQ on those alternative grounds.

The court affirmed on still other grounds. Kennecott submitted its EIA in February 2006, and public hearings on the mining application were held in September of that year. In their brief on appeal, appellants advise that Kennecott and the DEQ "were informed of the significance of Eagle Rock during the Part 632 public comment period," thus admitting that Kennecott had no knowledge of any such customs when it submitted its EIA. Appellants nowhere suggest that any investigation or inquiry on Kennecott's part in those early stages of the proceedings was deficient, nor do they cite any authority for the proposition that a mining applicant is obliged to update its EIA throughout the whole review process to take account of newly acquired information. Accordingly, assuming without deciding that no stipulation prevented litigation of this issue, and also that "places of worship" for purposes of Rule 425.202(2)(p) include such outdoor locations as Eagle Rock, we nonetheless hold that Kennecott Eagle's EIA was not deficient for want of consideration of Eagle Rock as a place of worship, because it neither knew, nor should have known, of such traditional cultural uses of that location when it offered its EIA. For the reasons stated, we affirm the decision of the circuit court affirming the DEQ's decision to grant Kennecott Eagle a Part 632 mining permit. Affirmed.

F. Fisheries, Water, FERC, BOR

34. ***Squaxin Island Tribe v. Wash. State Dept. of Ecology***, No. 42710–9–II, 312 P.3d 766 (Wash. Ct. App. Nov. 13, 2013). Indian tribe sought review of Department of Ecology’s denial of its rulemaking petition, which sought amendments to watershed management rules to protect minimum instream flows of creek. The Superior Court found that denial of petition was arbitrary and capricious. Department appealed. The appellate court held that: (1) Department’s written denial of tribe’s rulemaking petition satisfied statute that required agency to provide reasons for rejecting a rulemaking request, and (2) decision to deny tribe’s rulemaking petition was not arbitrary and capricious. Reversed.

35. ***U.S. v. Brown; U.S. v. Jerry A. Reyes, a/k/a Otto Reyes, Marc L. Lyons, and Frederick W. Tibbetts, a/k/a Bud Tibbetts***, Nos. 13–68 and 13–70, 2013 WL 6175202 (D. Minn. 2013). Defendants Michael Brown, Jerry Reyes, Marc Lyons, and Frederick Tibbetts were indicted for violating the Lacey Act by transporting and selling fish in violation of tribal law. 16 U.S.C. § 3372(a).1 Defendants moved to dismiss their respective indictments on the grounds that, as members of the Leech Lake and White Earth bands of Chippewa Indians, their right to fish on the Leech Lake Reservation is protected by the 1837 Treaty with the Chippewa, 7 Stat. 536, July 29, 1837, such that the federal prosecution violated their treaty rights. U.S. Magistrate Judge Brisbois issued a Report and Recommendation (R&R) in each case, recommending that the Court deny Defendants’ motions to dismiss. Defendants objected to the R&Rs. The Court sustained the objections. The Court dismissed Defendants’ indictments because the 1837 Treaty protects Defendants’ right to fish on the reservation and Congress has not specifically abrogated that right.

36. ***Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Black***, No. 06-2248, 2013 WL 6796423 (D. Kan. 2013). Before the court were cross motions for summary judgment filed by defendant Nemaha Brown Watershed Joint District No. 7 and plaintiff Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas. The Tribe and the District entered into the Watershed Plan and Environmental Impact Statement for the Upper Delaware and Tributaries Watershed (Agreement) in 1994 to serve as co-sponsors of a project aimed to carry out works of improvement for soil conservation and for other purposes, including flood prevention. The parties agreed to co-sponsor the project after failed attempts by each party to sponsor the project on its own. In addition to twenty floodwater retarding dams and other various improvements, the Agreement included plans for a multipurpose dam with recreational facilities, otherwise known as the “Plum Creek Project.” The Tribe asked the District multiple times to exercise its power of eminent domain to condemn non-Indian-owned land for the Plum Creek Project that the Tribe had been unable to acquire on its own. The District declined the Tribe’s request each time. In essence, the Tribe claimed that the Agreement is a binding contract that obligates the District to condemn 1,200 acres of

land on the Tribe's behalf to build the Plum Creek Project. The court granted summary judgment in the District's favor and against the Tribe based on its determination as a matter of law that the Agreement does not obligate the District to condemn on the Tribe's behalf.

37. *Skokomish Indian Tribe v. Goldmark*, No. C13-5071, 2014 WL 119022, __ F. Supp. 2d __ (W.D. Wash. 2014). An Indian tribe brought action against government officials, seeking to protect the privilege of hunting and gathering roots and berries on open and unclaimed lands, guaranteed by Treaty. Defendants moved to dismiss. The District Court held that: (1) Indian tribe established a cognizable injury for purposes of Article III standing; (2) Eleventh Amendment did not bar Indian tribe's claims against county prosecutors; (3) Eleventh Amendment did not bar Indian tribe's claims against Director of Washington Department of Fish and Wildlife (WDFW) and Chief of WDFW Enforcement; (4) Eleventh Amendment did not bar Indian tribe's claims against Washington State Attorney General; (5) Eleventh Amendment barred Indian tribe's claims against the Washington State Commissioner of Public Lands and Administrator for the Department of Natural Resources (DNR) and the Supervisor for DNR; (6) other signatory Indian tribes to Treaty were necessary parties; and (7) prejudice to other signatory Indian tribes to Treaty, who were necessary parties and who could not be joined due to their sovereign immunity, warranted dismissal. Motion granted.

38. *U.S. v. Lummi Nation*, No. 12-35936, 2014 WL 4067168, __ F.3d __ (9th Cir. 2014). In proceedings to adjudicate fishing rights reserved by 1855 Treaty of Point Elliott, Lower Elwha Band of S'Klallams, Jamestown Band of S'Klallams, Port Gamble Band of S'Klallams, and Skokomish Indian Tribe sought determination that the Lummi Indian Tribe was violating 1974 District Court opinion in *United States v. Washington* by fishing in areas outside its adjudicated usual and accustomed grounds and stations. The District Court dismissed the action following the entry of summary judgment order in 1990 in favor of plaintiff tribes, determining that the 1974 opinion did not intend to include disputed areas within Lummi tribe's usual and accustomed grounds and stations. Plaintiff tribes appealed. The Appellate Court, 235 F.3d 443, affirmed in part and reversed in part. On remand, the District Court, 2012 WL 4846239, entered summary judgment on Klallam tribes' request for determination that Lummi tribe's usual and accustomed grounds did not include eastern portion of Strait of Juan de Fuca or waters west of Whidbey Island. Lummi tribe appealed. The Appellate Court held that law of the case doctrine did not control determination of Lummi tribe's usual and accustomed grounds. Reversed and remanded.

G. Gaming

39. *State ex rel. Dewberry v. Kitzhaber*, No. A146366, 2013 WL 6022097, ___ P.3d ___ (Or. Ct. App. 2013). Residents near site of proposed casino brought action as relators for a writ of mandamus, challenging the Governor's authority to enter into a gaming compact with tribes under the Indian Gaming Regulatory Act (IGRA). The Circuit Court dismissed the petition, and residents appealed. The Appellate Court, 187 P.3d 220, reversed and remanded, and the State appealed. The Supreme Court, 346 Or. 260, 210 P.3d 884, affirmed and remanded. On remand, the Circuit Court entered summary judgment in favor of Governor and tribes. Property owners appealed. The Appellate Court held that: (1) State statute governing agreements by the state and local governments with American Indian tribes conferred authority on Governor to enter into gaming compact with Indian tribes under IGRA; (2) the state constitutional ban on the operation of casinos in the state does not apply on Indian lands located within state's borders; and (3) the statute authorizing the Governor to enter into gaming compact with Indian tribes did not improperly delegate legislative functions to the Governor in violation of separation of powers doctrine. Affirmed.

40. *Big Lagoon Rancheria v. California*, Nos. 10–17803, 10–17878, 2014 WL 211763 (9th Cir. 2014). An Indian tribe brought action alleging that the State violated the Indian Gaming Regulatory Act (IGRA) by failing to negotiate in good faith for a casino on a particular 11-acre parcel of land. The District Court granted summary judgment for the tribe, 759 F. Supp. 2d 1149, but, subsequently, granted the State's motion for a stay pending appeal, 2012 WL 298464. Both parties appealed. The Appellate Court held that: (1) the tribe's right to request negotiations under the IGRA depends on it having jurisdiction over Indian lands on which it proposed to conduct gaming; (2) the State could waive the IGRA's "Indian lands" requirement; (3) the State's challenge to entrustment of 11-acre parcel of land to tribe was timely; and (4) the 11-acre parcel of land did not constitute "Indian lands" over which tribe could demand negotiations. Reversed and remanded.

41. *Friends of Amador County v. Salazar*, No. 11–17996, 2014 WL 308560 (9th Cir. 2014). An advocacy organization and its members brought action against the State of California and its Governor, the Department of the Interior (DOI) and its Secretary, and the National Indian Gaming Commission (NIGC) and its Acting Chairman, challenging the state's gaming compact with an Indian Tribe, and the federal recognition of the Tribe. The Indian tribe intervened. The District Court, 2011 WL 4709883, granted the Tribe's motion to dismiss, and denied a motion to vacate the dismissal, 2011 WL 6141291. The advocacy organization and its members appealed. The Appellate Court held that: (1) the District Court did not abuse its discretion in determining that the Indian Tribe was a required party; (2) the District Court did not

abuse its discretion in determining that it would not be feasible to join the Indian Tribe; (3) the District Court did not abuse its discretion in determining that the Indian Tribe was an indispensable party; and (4) the public rights exception to joinder did not apply. Affirmed.

42. *Catawba Indian Nation v. State*, No. 2012–212118, 2014 WL 1307180, __ S.E. 2d __ (S.C. 2014). An Indian tribe brought a declaratory judgment action against the state to determine the effect of Gambling Cruise Act on its gambling rights. The Circuit Court granted state summary judgment. Tribe appealed. The Supreme Court held that: (1) declaratory judgment action was not precluded by doctrine of collateral estoppel; (2) action was not precluded by doctrine of res judicata; but (3) Act did not authorize tribe to offer video poker on its reservation. Affirmed in part and reversed in part.

43. *Alabama v. PCI Gaming Authority*, No. 2:13–CV–178, 2014 WL 1400232 (M.D. Ala. 2014). (From the opinion.) The State of Alabama brought an equity action under state-nuisance law and the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, 18 U.S.C. §§ 1166-1168, to prevent allegedly unlawful gaming at three Indian-run casinos in Alabama: Creek Casino in Elmore County; Wind Creek Casino in Escambia County; and Creek Casino in Montgomery County. Defendants are PCI Gaming Authority, the commercial entity through which the Poarch Band of Creek Indians ("Poarch Band") operates the casinos, and members of PCI Gaming Authority and of the Poarch Band Tribal Council in their official capacities. After careful consideration of the arguments of counsel, the pertinent law, and the pleadings, as supplemented by the undisputed evidence, the court found that the Defendants' motion to dismiss was due to be granted.

H. Jurisdiction, Federal

44. *U.S. v. Zepeda*, No. 10-10131, __ F.3d __, 2013 WL 5273093, (9th Cir. 2013). On October 25, 2008, Damien Zepeda was charged with conspiracy to commit assault, assault with a deadly weapon, and use of a firearm during a crime of violence. The indictment alleged that Zepeda was an "Indian []." Following a jury trial, Zepeda was convicted of all counts. Zepeda's appeal called upon the court to decide whether a Certificate of Enrollment in an Indian tribe, entered into evidence through the parties' stipulation, was sufficient evidence for a rational juror to find beyond a reasonable doubt that the defendant was an Indian for the purposes of § 1153 where the government offers no evidence that the defendant's bloodline is derived from a federally recognized tribe. At Zepeda's trial, the government introduced into evidence a document entitled "Gila River Enrollment/Census Office Certified Degree of Indian Blood." The document bore an "official seal" and stated that Zepeda was "an enrolled member of the Gila River

Indian Community,” and that “information [wa]s taken from the official records and membership roll of the Gila River Indian Community.” It also stated that Zepeda had a “Blood Degree” of “1/4 Pima [and] 1/4 Tohono O’Odham” for a total of 1/2. The prosecutor and Zepeda’s attorney stipulated to admission of the Certificate into evidence without objection. On appeal, Zepeda argued inter alia, that the government failed to prove beyond a reasonable doubt that he was an Indian under § 1153.

The Appellate Court held that the Tribal Enrollment Certificate was insufficient to establish that Zepeda was an Indian for the purposes of federal jurisdiction under § 1153 because the government introduced no evidence that Zepeda’s bloodline was derived from a federally recognized tribe. The court reversed Zepeda’s convictions under § 1153, in counts 2 through 9 of the indictment. Zepeda’s conviction for conspiracy in violation of 18 U.S.C. § 371 was unaffected by this disposition. Reversed in part and remanded for resentencing.

45. *Trazell v. Wilmers*, No. 12–01369, 2013 WL 5593042 (D.D.C. 2013). Car owner, a member of the Cherokee-Choctaw nation, brought action against bank, its director, and bank employee, alleging that the defendants repossessed his vehicle in violation of Treaty of Watertown, Fourth and Fifth Amendments, several of his statutory rights, international resolutions, and District of Columbia Municipal Regulations. The defendants moved to dismiss and the owner moved for summary judgment. The District Court held that: (1) owner’s complaint failed to state claim for violation of Treaty of Watertown; (2) the complaint failed to state claim for violation of Fourth Amendment, Fifth Amendment Due Process Clause, and section 1983; (3) the complaint failed to state claim for violation of statute providing protection to foreign officials, official guests, and internationally protected persons from physical attack or imprisonment; (4) the complaint failed to state claim for violation of statute governing loans by a bank on its own stock; (5) the complaint stated claim for violation of municipal regulation requiring holder to retain or store repossessed vehicle for 15 days; and (6) the genuine dispute of material fact existed as to whether defendants had valid security interest in owner’s vehicle. Defendants’ motion was granted in part, denied in part and the owner’s motion denied.

46. *Brenner v. Bendigo*, No. CIV 13–0005, 2013 WL 5652457 (D.S.D. 2013). Plaintiff Michelle Brenner (Brenner) filed an Affidavit for Garnishment (Affidavit) seeking to enforce a tribal court judgment in Federal District Court pursuant to a state garnishment statute. Garnishees Beau Bendigo, Larry Bendigo, and Bendigo Ranch filed a Motion to Dismiss arguing that this Court lacks subject matter and personal jurisdiction to enforce the tribal court judgment, that the Affidavit failed to state a claim upon which relief can be granted, and that Brenner had not complied with South Dakota Codified Law (SDCL) 21–18–9. Brenner brought a wrongful death action against Cody

Bendigo in Cheyenne River Sioux Tribal Court. In an Order on Damages dated December 20, 2006, the Cheyenne River Sioux Tribal Court awarded Brenner a \$3,000,000.00 judgment against Cody Bendigo. It does not appear that Brenner has sought first to enforce this judgment in the Cheyenne River Sioux Tribal Court before attempting the collection proceeding before this Court. Beau Bendigo is an enrolled member of the Cheyenne River Sioux Tribe who lives with his father, Larry Bendigo, on tribal trust land within the boundaries of the Cheyenne River Indian Reservation. Beau Bendigo's ranch, called Bendigo Ranch, and ranching equipment are on tribal trust land that he leases from the Cheyenne River Sioux Tribe and the United States Bureau of Indian Affairs and sit within the confines of the Cheyenne River Indian Reservation. Thus, it appears that all the property that Brenner seeks to execute upon is either tribal trust land held in trust by the Bureau of Indian Affairs for the Cheyenne River Sioux Tribe or assets located on tribal trust property within the Cheyenne River Indian Reservation. The court granted the defendant's Motion to Dismiss and dismissed the plaintiff's Affidavit for Garnishment.

47. *Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation*, No. 13-00123, 2013 WL 5954391 (D. Utah 2013). This matter was before the court on defendants' motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Defendants moved to dismiss Plaintiff Becker's amended complaint, which stated three causes of action: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; and (3) accounting. Becker's claims arose from a dispute over an agreement he entered into with one or more of the defendants. Because plaintiff's complaint did not, on its face, plead causes of action created by federal law, and because the plaintiff's causes of action did not include, as an essential element, any right or immunity created by federal law, the court concluded that plaintiff's claims did not meet the "arising under" standard for federal-question jurisdiction and that the court was without jurisdiction to hear plaintiff's claims. Accordingly, the court granted defendants' motion to dismiss for lack of subject-matter jurisdiction and dismissed plaintiff's amended complaint.

48. *F.T.C. v. AMG Services, Inc.*, No. 2:12-CV-00536, 2014 WL 910302 (D. Nev. 2014). Pending before the court for consideration was the Report and Recommendation of the Magistrate Judge. The FTC filed its Complaint alleging that defendants had violated portions of the Federal Trade Commission Act (FTC Act) 15 U.S.C. §§ 41-58; the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-1667f; and the Electronic Fund Transfer Act (EFTA), 15 U.S.C. §§ 1693-1693r. These violations were alleged to have occurred in connection with the defendants' activities in offering and extending "high-fee, short-term 'payday' loans and the collection of those loans." The FTC's Motion For Partial Summary Judgment and the defendants' Motions for Legal Determination were referred to the Magistrate Judge. The Magistrate Judge

recommended an order granting in part and denying in part the FTC's Motion for Partial Summary Judgment and granting in part and denying in part the Tribal Chartered Defendants' Motion for Legal Determination and defendant Little Axe's Cross-Motion for Legal Determination. Defendant Little Axe filed an Objection in which he argues that the Magistrate Judge erred in finding that the FTC does have authority under the FTC Act to regulate Indian tribes, arms of Indian tribes, employees of arms of Indian tribes, and contractors of arms of Indian tribes and in failing to apply Indian law canons and certain Supreme Court opinions that defendant LittleAxe asserted are controlling on this issue. The Tribal Chartered defendants filed an Objection in which they argued that the Magistrate Judge erred in his conclusion that (1) the defendants bear the burden of proving whether the FTC Act applies to the Tribal Chartered Defendants and that (2) the FTC has authority under the FTC Act to regulate Indian tribes, arms of Indian tribes, employees of arms of Indian tribes, and contractors of arms of Indian tribes. The court found that the Magistrate Judge correctly found that the FTC Act is a federal statute of general applicability that under controlling Ninth Circuit precedent grants the FTC authority to regulate arms of Indian tribes, their employees, and their contractors. The court accepted and adopted in full, to the extent it is not inconsistent with this opinion the Magistrate Judge's Recommendations.

49. *Tavares, et al. v. Whitehouse, et al.*, No. 2:13-cv-02101, 2014 WL 1155798 (E.D. Cal. 2014). This matter was before the Court on Respondents' Motion to Dismiss for lack of jurisdiction. Petitioners are members of the United Auburn Indian Community ("Tribe"). Petitioners challenged punishment imposed on them by the Tribal Council of the United Auburn Indian Community. Respondents, members of the Tribal Council, sought dismissal, arguing the case concerned internal tribal matters, and therefore the Court lacked jurisdiction. Petitioners opposed dismissal arguing their petition was within the Court's jurisdiction under the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. § 1303, because their exclusion from tribal lands and suspension of per capita gaming benefits. Although temporary, it still constituted "detention" within the meaning of the statute. This case arose from a dispute over tribal management. Petitioners initiated an unsuccessful recall campaign attempting to remove Respondents, members of the Tribal Council, from office. Afterward, the Tribal Council determined Petitioners had violated a Tribal ordinance prohibiting defamation. Petitioners alleged their punishment was imposed in retaliation for the recall campaign. Petitioners argued their punishment constituted banishment, invoking this Court's ICRA habeas jurisdiction. The Court analyzed the issue raised by Respondents' motion: whether Petitioners' punishment was so severe a restraint on liberty it constituted "detention" sufficient to invoke the Court's federal habeas corpus jurisdiction under ICRA. The Petition for Writ of Habeas Corpus under the Indian Civil Rights Act was dismissed.

50. **Hawkins v. Attatayuk**, No. S-14812, 2014 WL 1408563, __ P.3d __ (Alaska 2014). Former wife brought trespass action against former husband. The Superior Court entered judgment in favor of former wife. Former husband appealed. The Supreme Court held that Superior Court lacked subject matter jurisdiction to adjudicate title to Alaska Native townsite property allegedly owned by former wife. Reversed and remanded with directions.

51. **E.E.O.C. v. Forest County Potawatomi Community**, No. 13-MC-61, 2014 WL 1795137 (E.D. Wis. 2014). The Equal Employment Opportunity Commission filed this action to enforce a subpoena it served pursuant to the Age Discrimination in Employment Act (ADEA or the Act) on the Forest County Potawatomi Community (Tribe) in its capacity as proprietor of Potawatomi Bingo Casino. The subpoena sought information relating to a charge of discrimination filed by Federico Colón, who was not a member of the Tribe but who was employed at the Casino as a “security shift manager.” The Tribe contended that it was not subject to the ADEA and that therefore the subpoena was invalid. It also contended that the subpoena should not be enforced because the EEOC had failed to conciliate and because the subpoena sought irrelevant information. The Tribe’s primary argument as to why it was not covered by the ADEA was that it was not an “employer” within the meaning of the Act. The court concluded that the ADEA was generally applicable and therefore presumed to apply to Indian tribes; that the Tribe’s relationship with Colón was covered by the ADEA; that the EEOC was not bound by a statement made in a dismissal determination; that sovereign immunity does not prevent the Tribe from having to comply with the EEOC’s subpoena; and that information relating to age-based complaints made by employees other than Colón around and after the time of his termination is relevant. The court ordered that the Tribe shall comply with the subpoena within thirty days.

52. **Bodi v. Shingle Springs Band of Miwok Indians**, No. S-13-1044, 2014 WL 1922783 (E.D. Cal. 2014). Tribe member brought California state court action against tribe and tribal health program and board, alleging, inter alia, that tribe member was wrongfully terminated due to her illness in violation of the Family and Medical Leave Act (FMLA). Following removal, tribe moved to dismiss. The district court held that tribe waived sovereign immunity by removing action to federal court. Motion granted in part and denied in part.

53. **Caddo Nation of Okla. v. Court of Indian Offenses for the Anadarko Agency**, No. 14-281, 2014 WL 3880464 (W.D. Okla. 2014). Before the Court was Defendant’s Motion to Dismiss. This action arose out of a dispute between two competing factions, each claiming, to the exclusion of the other, to have leadership of and control over the Caddo Nation of Oklahoma. A faction supporting Vice-Chairman Phillip Smith, on behalf of the Caddo Nation of Oklahoma, filed suit on March 13, 2014,

in the Court of Indian Offenses for the Caddo Nation of Oklahoma, Anadarko, Oklahoma. That faction obtained emergency injunctive relief to enjoin Plaintiff Brenda Edwards from acting as Chairperson for the Caddo Nation. The Court of Indian Offenses for the Caddo Nation, Anadarko, Oklahoma is the Defendant in this action. Defendant is one of the courts established by the United States Department of the Interior pursuant to 25 C.F.R. Part 11. On March 20, 2014, Plaintiffs, a faction supporting Brenda Edwards, commenced this action on behalf of the Caddo Nation of Oklahoma and moved for issuance of a temporary restraining order. Plaintiffs sought to enjoin the enforcement of the Emergency Order issued by the CFR Court against Plaintiff Brenda Edwards.

The Court denied the request for issuance of a temporary restraining order, finding Plaintiffs failed to meet their burden pursuant to Fed.R.Civ.P. 65(b). It was well-established that as a matter of comity, a federal court should not exercise jurisdiction over cases arising under its federal question or diversity jurisdiction, if those cases are also subject to tribal jurisdiction, until the parties have exhausted their tribal remedies. Plaintiffs contended the tribal exhaustion requirement should not apply because the CFR Court was not a tribal court and further, because the CFR Court lacked subject matter jurisdiction to consider the dispute. The Court rejected Plaintiffs' contentions and found that Plaintiffs' contentions are based on the false presumption that the CFR Court clearly lacks jurisdiction over the dispute between the two factions.

The proceedings in the CFR Court were the first to be filed and a factual record has been made in those proceedings addressing the jurisdictional issue. Plaintiffs have the opportunity to be heard in that forum, to raise the jurisdictional challenges there, and to appeal any adverse determination. The Court found it should abstain from exercising jurisdiction until Plaintiffs have fully exhausted the remedies available to them in the tribal courts. When tribal remedies are fully exhausted, Plaintiffs may then, if necessary, proceed in federal court. The Court granted Defendant's Motion to Dismiss and dismissed the action without prejudice to refile.

I. Religious Freedom

54. *Chance v. Tex. Dep't of Criminal Justice, et al.*, No. 12-41015, 2013 WL 4517263 (5th Cir. 2013). State prisoner brought action against prison officials, challenging restrictions on his Native American religious practices under the Religious Land Use and Institutionalized Persons Act (RLUIPA). The District Court, 2012 WL 3257836, adopted report and recommendation of Magistrate Judge, 2012 WL 3257813, and granted defendants' motion for summary judgment. Prisoner appealed. The Appellate Court held that: (1) prison's complete ban on communal pipe-smoking did not violate RLUIPA; (2) prison's schedule of Native American religious services did not

violate RLUIPA; (3) prison policy limiting Native American Smudging ritual to outdoor ceremonies did not violate RLUIPA, but (4) genuine issue of material fact with regard to whether prison's refusal to allow prisoner to possess locks of relatives' hair in accordance with his Native American religious practice was least restrictive means of furthering prison's compelling interests precluded summary judgment. Affirmed in part, vacated in part, and remanded.

55. *Yellowbear v. Lampert*, No. 12–8048, 2014 WL 241981 (10th Cir. 2014). State prisoner commenced action against individual prison officials, seeking prospective injunctive relief against them for violations of Religious Land Use and Institutionalized Persons Act (RLUIPA). The District Court granted summary judgment for prison personnel. Prisoner appealed. The Appellate Court held that factual issue existed as to whether preventing state prisoner from exercising his sincerely held religious belief that using sweat lodge cleansed and purified his mind, spirit, and body served compelling governmental interest and that it was least restrictive means of furthering that interest. Vacated and remanded.

56. *State v. Armitage*, Nos. SCWC–29794, SCWC–29795, SCWC–29796, 2014 WL 305638, __ P.3d __ (Haw. 2014). Three defendants, all native Hawaiians, were each charged by complaint with entering the Kahoolawe island reserve without authorization, a petty misdemeanor. The cases were consolidated. The parties entered into a stipulation as to evidence, and the District Court found defendants guilty as charged. Defendants appealed. The Intermediate Court of Appeals, 2013 WL 1829663, affirmed. Defendants filed an application for writ of certiorari, which the Supreme Court accepted. The Supreme Court held that: (1) complaints did not allege the requisite state of mind, requiring dismissal without prejudice; (2) statute of limitations did not bar the prosecution from refiling complaints against defendants; (3) evidence was sufficient to support the convictions; (4) native Hawaiian privilege did not bar the convictions; (5) defendants had standing to challenge the constitutionality of the administrative rule prohibiting a person from entering the reserve without authorization; (6) expressed purpose of defendants in entering the reserve involved conduct that did not constitute speech protected under the First Amendment; and (7) defendants did not show that the exercise of their religion was substantially burdened by the prohibition rule or a related procedure rule. Vacated and remanded.

57. *Rayellen Resources, Inc. v. New Mexico Cultural Properties Review Committee*, No. 33,497, 2014 WL 486088 (N.M. 2014). Objectors sought review of decision of Cultural Properties Review Committee to permanently list approximately 400,000 acres of public land on mountain as a registered cultural property under Cultural Properties Act. The Fifth Judicial District Court affirmed in part and reversed in part. Proponents petitioned for certiorari and objectors cross-petitioned for certiorari.

The Court of Appeals granted petitions and certified case. The Supreme Court held that: (1) notice about public comment period satisfied procedural due process; (2) the listing satisfied Act requirements on maintenance, inspection, and integrity; (3) land grant common lands did not constitute “state land” subject to regulation under Act; (4) substantial evidence supported Committee’s findings on historic eligibility; (5) Committee had discretion to fine-tune boundaries during course of Committee’s investigation of request for a permanent listing; (6) Committee’s apparent clerical error in calculating total number of acres did not render the listing arbitrary and capricious; and (7) the listing did not violate Establishment Clause. Affirmed in part, reversed in part, and remanded.

58. *Native American Council of Tribes v. Weber*, Nos. 13–1401, 13–2745, 2014 WL 1644130, 750 F.3d 742 (8th Cir. 2014). Native American organization and inmates brought action against prison officials, claiming that the prison’s policy of prohibiting tobacco use by Native American inmates during religious activities substantially burdened the exercise of their religious beliefs in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). The District Court, 897 F. Supp. 2d 828, found the restrictions violated RLUIPA and ordered parties to confer. After the parties failed to agree on a new tobacco policy, the District Court, 2013 WL 310633, entered a remedial order granting injunctive relief. The prison officials appealed. The Appellate Court held that: (1) the inmates’ use of tobacco during Native American ceremonies was a religious exercise; (2) the prison’s complete ban on tobacco use substantially burdened the exercise of the inmates’ religious beliefs; (3) a complete ban was not the least restrictive means of furthering the prison’s interest in order and security; and (4) the District Court’s remedial order was narrowly tailored to remedy the violation of inmates’ rights. Affirmed.

59. *Sharp v. Gay*, No. 2:11 CV 925, 2014 WL 3556341 (D. Ariz. 2014). Plaintiff Gabriel Sheridan Sharp, a Mojave Indian and an inmate at the Central Arizona Correctional Facility (CACF), brought suit against Charles Ryan, Director of the Arizona Department of Corrections (ADOC). Invoking 42 U.S.C. § 1983, Sharp claimed all defendants denied him equal protection by refusing to allow Native American inmates an additional weekly “turnout,” the prison’s term for a scheduled inmate religious activity. Sharp also claimed that ADOC policy regarding inmate access to firewood, the fuel for Native American sweat ceremonies, violated RLUIPA. The Court denied Sharp’s Equal Protection Clause claim but his RLUIPA claim was granted. ADOC was directed to establish a group religious account.

60. *Haight, et al. v. Thompson, et al.*, No. 13-6005, 2014 WL 1092969, (6th Cir. 2014). Death-row inmates filed a lawsuit under the Religious Land Use and Institutionalized Persons Act (RLUIPA) for a variety of reasons – some related to

requests to practice their Native American faith and some related to a request for clergy visits. Three inmates claimed that prison officials violated the Act by denying them access to a sweat lodge for religious ceremonies and refusing to provide traditional foods for Native American religious ceremonies. The inmates offered to pay for the lodge. The state commissioner promised a decision “in the near future,” more than four years ago and since has not issued a decision yet. The three inmates also requested Native American foods for their annual powwow.

The District Court granted summary judgment to the prison officials on the sweat-lodge and ceremonial-foods requests, holding that the inmates failed as a matter of law to support their claims under RLUIPA. The second group of inmates contends that prison officials violated RLUIPA when they failed to facilitate inmate access to visiting clergy members. Before June 2010, the Kentucky State Penitentiary had regularly granted visiting clergy members the opportunity to see prison inmates under a “special visit” exception to the prison visitation policy. But the practice changed when prison officials discovered that it conflicted with statewide prison procedures. The Religious Land Use and Institutionalized Persons Act prohibits state and local governments from placing “a substantial burden” on the “religious exercise” of any inmate unless they establish that the burden furthers a “compelling governmental interest” and does so in the “least restrictive” way. 42 U.S.C. § 2000cc–1(a).

The appeal presented three questions: (1) Is there a triable issue of fact over whether RLUIPA gives the inmates a right to have access to a sweat lodge for faith-based ceremonies? (2) Is there a triable issue of fact over whether RLUIPA gives the inmates a right to buffalo meat and other traditional foods for a faith-based once-a-year powwow? (3) Does RLUIPA permit inmates to collect money damages from prison officials sued in their individual capacities?

The answers, respectively, were yes, yes and no. RLUIPA applies to prisons that receive federal funds and prohibits state and local governments from placing “a substantial burden” on the “religious exercise” of any inmate unless they establish that the burden furthers a “compelling governmental interest” and does so in the “least restrictive” way. 42 U.S.C. § 2000cc–1(a). To establish a cognizable claim under RLUIPA, the inmate must first demonstrate that a prison policy substantially burdens a religious practice. So long as the practice is traceable to a sincerely held religious belief, see *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005), it does not matter whether the inmates’ preferred exercise is “central” to his faith, 42 U.S.C. § 2000cc–5(7)(A). Once an inmate makes this showing, the prison policy survives only if it serves a compelling governmental interest in the least restrictive way. *Id.* § 2000cc–1(a).

61. *White v. University of California*, No. 12–17489, 2014 WL 4211421, 765 F.3d 1010 (9th Cir. 2014). Scientists brought declaratory judgment action against a tribal repatriation committee, university, its regents, and certain of its officials, opposing repatriation of aboriginal human remains that had been possessed by federally funded museums and educational institutions since their discovery on university property during archaeological field excavation project. The District Court dismissed the complaint. Scientists appealed. The Appellate Court held that: (1) scientists had standing to bring action seeking a declaration that the remains were not “Native American” within meaning of the Native American Graves Protection and Repatriation Act (NAGPRA); (2) NAGPRA did not abrogate tribes’ sovereign immunity from suit; (3) the tribal repatriation committee was entitled to tribal sovereign immunity as an arm of the tribe; (4) the tribal repatriation committee did not waive its sovereign immunity; (5) the tribes and repatriation committee were necessary parties; (6) the tribes and repatriation committee were indispensable parties; and (7) the public rights exception to compulsory joinder rule did not apply. Affirmed

J. Sovereign Immunity

62. *Swanda Bros., Inc. v. Chasco Constructors, Ltd., L.L.P., et al.*, No. CIV–08–199–D, 2013 WL 4520203 (W.D. Okla. 2013). Before the Court was the renewed motion of Defendant Kiowa Casino Operations Authority (KCOA) to dismiss the claims due to lack of subject matter jurisdiction. KCOA argued that the Court lacked subject matter jurisdiction because KCOA was entitled to tribal sovereign immunity from liability on the claims asserted by plaintiff because it was an instrumentality of the Kiowa Indian Tribe of Oklahoma (KIC). Evidence was presented which referenced a July 9, 2005 meeting at which the KIC considered a ballot initiative authorizing KCOA to enter into financing and other agreements with regard to the construction of a gaming facility. Because KCOA had previously represented to the Court that no election had taken place, the Court determined the new evidence warranted reopening the matter. The Court further found that the KIC validly authorized KCOA to consent to jurisdiction in the state and federal courts, and to thereby waive tribal sovereign immunity, by authorizing it to execute agreements containing mandatory arbitration clauses and/or agreements to consent to federal and state court jurisdiction. The Court found that KCOA validly waived tribal sovereign immunity in executing the Chasco Construction Agreement. Accordingly, the renewed motion to dismiss was denied.

63. *Carsten v. Inter-tribal Council of Nevada et al.*, No. 3:12–cv–00493, 2013 WL 4736709 (D. Nev. 2013). Before the Court was defendants’ Motion to Dismiss and Motion to Dismiss the Amended Complaint. Plaintiff was employed by ITCN as the program director for the Women, Infants and Children (WIC) program until she was terminated on or about July 9, 2012. Plaintiff alleged that, prior to termination, she had

a serious medical condition that made her eligible for time off under the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 et seq. Plaintiff claimed that defendants violated the FMLA by: (1) refusing to let the plaintiff leave; and (2) terminating her for requesting leave. Defendants argued that the ITCN is entitled to sovereign immunity. They moved to dismiss for lack of subject matter jurisdiction under Rule 12(b) and offered affidavits in support.

As there is no clear waiver or congressional abrogation in this case, the question the Court faces is whether the ITCN, as an inter-tribal council and not a tribe itself, can rightfully be entitled to sovereign immunity. Sovereign immunity is not limited to the tribe itself. “When the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe.” *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006) (citations omitted). Sovereign immunity thus exists where the relevant entity’s activities can be properly attributed to the tribe. While the Ninth Circuit has not ruled on whether an inter-tribal council is entitled to sovereign immunity, in *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1998), the Ninth Circuit held that a non-profit inter-tribal council is properly considered a tribe for the purposes of the Indian tribe exception of Title VII. In so holding, the Ninth Circuit looked to the reasoning in *Dille v. Council of Energy Res. Tribes*, 801 F.2d 373, 375–76 (10th Cir. 1986), which held that Congress intended to exempt individual tribes and collective efforts by Indian tribes because “the purpose of the tribal exemption, like the purpose of sovereign immunity itself, was to promote the ability of Indian tribes to control their own enterprises.” See *Pink*, 157 F.3d at 1188. Tribal immunity extended to employees of a tribe “acting in their official capacity and within the scope of their authority.” *Cook v. AVI Casino Enter., Inc.*, 548 F.3d 718, 727 (9th Cir. 2008). Plaintiff sued Sterns and Crawford in their official capacity only. Plaintiff argued that the FMLA applies to the ITCN but the Court need not reach that argument. Absent clear waiver or congressional abrogation, the Court did not have the subject matter jurisdiction to consider this case. The cases cited by plaintiff in support of its argument that the ITCN is an employer subject to the FMLA were inapplicable. Those cases considered whether a general federal statute applied to a tribe or tribal entity in suits brought by the tribes or the federal government. Therefore, sovereign immunity was not an issue in those cases. The Court granted the defendants’ Motion to Dismiss the Amended Complaint with prejudice and denied the defendants’ Motion to Dismiss as moot.

64. *Martin v. Quapaw Tribe of Oklahoma*, No. 13–CV–0143, 2013 WL 5274236 (N.D. Okla. 2013). (From the opinion.) Before the Court were the Motion of the Defendant to Dismiss for Lack of Subject Matter Jurisdiction and plaintiff’s Motion for Leave to Amend Petition. The Quapaw Tribe of Oklahoma (the Tribe), defendant, argued that it had not waived its sovereign immunity from suit for tort claims arising at its gaming facilities and that plaintiff must pursue his claim against the Tribe’s

subdivisions in tribal court. Plaintiff responded that sovereign immunity was waived or should be treated as though it had been waived. On October 9, 2012, Todd Martin filed this case in the District Court of Ottawa County, Oklahoma, alleging that the Tribe operates the Downstream Casino and Resort (the Casino) in Ottawa County, Oklahoma, and that he was harmed on January 19, 2011, by a dangerous condition on the property when he was a Casino patron. A compact was entered into between the Tribe and the State of Oklahoma regulating gaming on tribal land, entitled "Tribal-State Gaming Compact Between the Quapaw Tribe of Oklahoma and the State of Oklahoma" (the Compact). The Casino is operated and managed by the Downstream Development Authority of the Quapaw Tribe of Oklahoma (Development Authority). Because the Development Authority manages the Casino (and the games played within), it is the relevant "enterprise" under the Compact. The Development Authority carries the insurance required by the Compact. Defendant argues that plaintiff's petition should be dismissed for lack of subject matter jurisdiction based on the Tribe's sovereign immunity. The Compact does not unequivocally waive the Tribe's sovereign immunity. It waives only the enterprise's sovereign immunity, and only in limited cases.

Because the Tribe had not consented to suit and there was no congressional authorization for suit, the Tribe was entitled to sovereign immunity. Even if the enterprise could be sued, any such waiver of sovereign immunity was not imputed to the Tribe. The petition was dismissed for lack of subject matter jurisdiction.

65. *Sheffer, et al. v. Buffalo Run Casino, PTE, Inc., et al*, No. 109265, 315 P.3d 359, 2013 WL 5332615 (Okla. 2013). The driver of a tractor trailer and passengers in tractor trailer sued Native American tribe and its casino under a theory of dram-shop liability. The parties were injured when a tractor trailer collided with the vehicle driven by the driver defendant. The driver of the tractor trailer was allegedly intoxicated from drinking alcohol at a gaming casino. The District Court dismissed, sua sponte, owner, determining that existing injunctions prohibited suit for any tort claims against a tribe or a tribal entity. Plaintiffs appealed. The Supreme Court held that: (1) the tribe was immune from suit in state court for compact-based tort claims, overruling *Griffith v. Choctaw Casino of Pocola*, 2009 OK 51, 230 P.3d 488; *Dye v. Choctaw Casino of Pocola*, 2009 OK 52, 230 P.3d 507, *Cossey v. Cherokee Nation Enters*, 2009 OK 6, 212 P.3d 447; (2) the tribe did not expressly waive its sovereign immunity from state dram shop claims when it applied for and received a state liquor license, overruling *Bittle v. Bahe*, 2008 OK 10, 192 P.3d 810. Affirmed.

66. *Stifel, Nicolaus & Co., Inc. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, No. 13-cv-372, 2013 WL 5803778 (W.D. Wisc. 2013). Non-Indian brokerage firm and bondholders, which were involved in a commercial transaction with a tribal economic development corporation, brought an action seeking declaration that a

tribal court lacked subject matter jurisdiction over them and an injunction preventing any further action by the tribe and its economic development corporation in a pending matter against them in that forum. Tribal defendants moved to dismiss. The District Court held that: (1) if forum selection clauses in documents created in connection with non-Indians' commercial transaction with tribal economic development corporation were valid, exhaustion of tribal remedies doctrine would not preclude federal court from exercising jurisdiction over the suit; (2) tribal sovereign immunity did not preclude district court from resolving suit; and (3) the Court would not decline to exercise declaratory jurisdiction over non-Indians' suit.

67. *Michigan v. Sault Ste. Marie Tribe of Chippewa Indians*, No. 13–1438, 2013 WL 6645395, 737 F.3d 1075 (6th Cir. 2013). State brought action to enjoin Indian tribe from applying to have land taken into trust by Interior Secretary pursuant to Michigan Indian Land Claims Settlement Act. The District Court granted the state's motion for preliminary injunction, and the tribe appealed. The Appellate Court held that: (1) the state's claim that tribe's trust submission would violate the tribal–state compact was barred by tribe's sovereign immunity, and (2) the state's claim that Indian tribe's conduct of class III gaming on trust property would violate the tribal–state compact and Indian Gaming Regulatory Act (IGRA) was not ripe for adjudication. Reversed.

68. *MM & A Productions, LLC v. Yavapai-Apache Nation*, No. 2 CA–CV 2013–0051, 2014 WL 185396 (Ariz. Ct. App. 2014). An event production company filed complaint against the Indian tribe and tribe's casino, alleging breach of exclusive entertainment and production agreement and associated claims. The Superior Court, No. C20085949, dismissed the complaint for lack of subject matter jurisdiction. Company appealed. The Appellate Court held that: (1) the alleged apparent authority to waive the tribe's sovereign immunity by signing agreement did not constitute valid waiver; (2) the Trial Court did not abuse its discretion in concluding that further discovery was unnecessary to determine that agreement did not waive immunity; and (3) the waiver of sovereign immunity signed prior to execution of agreement was insufficient to waive immunity as to agreement. Affirmed.

69. *People v. Miami Nation Enterprises*, No. B242644, 2014 WL 216318 (Cal. Ct. App. 2014). The People brought action against five payday lenders for injunctive relief, restitution, and civil penalties for violations of the Deferred Deposit Transaction Law (DDTL). Two tribal entities specially appeared and moved to quash service of summons. The Superior Court denied the motion. Companies filed petition for writ of mandate. The Court of Appeal denied petition. Companies filed petition for review. The Supreme Court granted petition and transferred the matter to the Court of Appeal. The Court of Appeal granted petition in part and denied it in part, 169 Cal. App. 4th 81, 86 Cal. Rptr. 3d 572. The Superior Court quashed service of summons and

dismissed the case for lack of subject matter jurisdiction. The People appealed. The Court of Appeal held that: (1) the tribal economic development authority was protected by tribal sovereign immunity, and (2) the tribal corporation was protected by tribal sovereign immunity. Affirmed.

70. *Bonnet v. Harvest (U.S.) Holdings, Inc.*, No. 12–4068, 2014 WL 292616 (10th Cir. 2014). Petroleum landman, and his sole proprietorship, brought action against various companies and individuals arising from Tribe’s termination of his contract to provide independent consultant services. Plaintiff served Tribe with non-party subpoena duces tecum requesting documents. The District Court, 2012 WL 994403, denied the Tribe’s motion to quash based on tribal immunity. Tribe appealed. The Appellate Court held that: (1) the denial of motion to quash based on tribal immunity was an immediately appealable collateral order, and (2) as matter of first impression in Circuit, the subpoena itself was “suit” against Tribe triggering tribal sovereign immunity. Reversed.

71. *In re Grand Jury Proceedings*, No. 13–2498, 2014 WL 702193 (1st Cir. 2014). Government moved to compel compliance by Indian tribe’s historic preservation office with subpoena duces tecum that was issued by since-defunct grand jury, representing that investigation had been transferred to a newly-empanelled grand jury. The preservation office objected and moved to quash subpoena on grounds of tribal sovereign immunity and unreasonableness. After granting the motion to compel and issuing a show cause order due to preservation office’s noncompliance, the District Court held the preservation office in civil contempt. Preservation office appealed. The Appellate Court held that: (1) the subpoena could not be enforced by civil contempt sanctions after expiration of issuing grand jury; (2) the exception to mootness doctrine applied to warrant review of preservation office’s additional challenges to subpoena; (3) tribal sovereign immunity provided no refuge from subpoena power of federal grand jury; and (4) denial of motion to quash subpoena as unreasonable was not abuse of discretion. Vacated.

72. *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, No. A12–1324, 2014 WL 949284, 843 N.W. 2d 577 (Minn. 2014). (from the opinion) In April 2012, respondent City of Duluth (the City) commenced an action in state District Court against appellant Fond du Lac Band of Lake Superior Chippewa (the Band), alleging breach of a 1986 contract regarding a casino in Duluth. The District Court dismissed the lawsuit after concluding that it lacked subject matter jurisdiction because the Band had only consented to suit in Federal Court in a 1994 agreement amending the 1986 contract. The Court of Appeals reversed after concluding that Minnesota courts have subject matter jurisdiction over the dispute. The Court granted review and

reversed the Court of Appeals' decision and reinstated the District Court's judgment for the Band.

73. *Miccosukee Tribe of Indians of South Florida v. Bermudez*, No. 3D13–2153, 2014 WL 2965411, 143 So. 3d 157 (Fla. Ct. App. 2014). The Miccosukee Tribe of Indians of South Florida appeals from a final judgment of \$4.1 million. This matter began when Carlos Bermudez sued two members of the Tribe, Tammy Gwen Billie and Jimmie Bert, for damages resulting from an automobile accident in which a car driven by Billie and owned by Bert crashed into Bermudez's car, killing Bermudez's wife and injuring Bermudez and his son. Following a jury verdict, a final judgment was entered against Billie and Bert for \$3.177 million. The Tribe was not a party when the final judgment was entered. Bermudez has yet to collect the judgment, as Billie and Bert assert they have no assets. Several years after the first final judgment was entered, Bermudez filed a motion to add the Tribe as a judgment debtor in the matter because the Tribe had funded and guided Billie and Bert's defense in the lawsuit. The Tribe objected on several grounds, including sovereign immunity. Following an evidentiary hearing, the Trial Court entered an order granting Bermudez's motion and the Trial Court accordingly entered a second final judgment in favor of Bermudez and solely against the Tribe for the full amount of the original final judgment, plus interest, for a total judgment of just over \$4.1 million.

That final judgment did not reference the earlier final judgment against Billie and Bert, which remains in effect. This appeal followed. Because Bermudez had not established some cognizable legal basis to add the Tribe as a judgment debtor, the Court did not address the Tribe's claim of sovereign immunity. Reversed and remanded.

74. *Black v. U.S.*, No. C13–5415, 2014 WL 3337466 (W.D. Wash. 2014). Before the Court was the Joint Motion to Dismiss Plaintiff's claims under Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction filed by defendants Suquamish Indian Tribe, Suquamish Tribal Police, Port Gamble S'Klallam Indian Tribe (PGST), PGST Tribal Police (collectively, Tribes), PGST Detective Greg Graves, and 25 John Doe Officers. The Tribes contended that tribal sovereign immunity shielded them and their officers from suit in federal court. Plaintiff Sherri Black claimed that neither the Tribes, nor their officers, were entitled to tribal sovereign immunity because they were acting under the color of state law when they entered the Blacks' home, or alternatively, that they waived this immunity through treaty.

In December 2011, Suquamish and Port S'Klallam tribal police officers jointly executed a tribe-issued misdemeanor arrest warrant for PGST member Stacy Stanley Callihoo. Shortly after he entered the home, Tribal Officer Greg Graves shot Thomas

Black five times as he was lying on a couch. The unique complexities of tribal sovereignty rendered the Court an inappropriate forum for Ms. Black to seek relief against the Indian tribes themselves. Her Complaint's allegations failed to strip the Tribes of their sovereign immunity. Black pleaded sufficient facts to state a viable § 1983 claim against the tribal police acting in their individual capacities, under color of state law. For these reasons, defendant Tribes' Motion to Dismiss Black's claims against the Suquamish and Port Gamble S'Klallam Indian Tribes for lack of subject matter jurisdiction was granted. Black's Motion to Amend was denied, so her only remaining claims against tribal Defendants were against Greg Graves.

The Motion to Dismiss Black's claims against Graves was denied.

75. *Cayuga Indian Nation of New York v. Seneca Cnty, N.Y.*, No. 12–3723, 2014 WL 3746795, __ F.3d __ (2nd Cir. 2014). A Native-American tribe brought action seeking permanent declaratory and injunctive relief against the county's attempts to collect property taxes on five parcels of land purchased by tribe. The District Court, 890 F. Supp. 2d 240, granted the tribe's motion for preliminary injunction to enjoin the county from foreclosing on properties pursuant to New York law. County appealed. The Appellate Court held that tribal sovereign immunity protected the tribe from suit. Affirmed.

76. *Chavez v. Morongo Casino Resort & Spa*, No. E056191, 2014 WL 4053805 (Cal. Ct. App. 2014). Six former employees of Morongo Casino Resort & Spa (Employees) are non-Indians who were employed by Morongo in the security department. Employees were terminated at different times during the years 2010 and 2011. Employees sued (1) Morongo Casino Resort & Spa (Morongo), also known as Morongo Gaming Agency, and also known as Morongo Band of Mission Indians; (2) Jerry Schultze, the Executive Director for the Morongo Gaming Agency; as well as (3) various Morongo management members, for (1) retaliation based upon discrimination; (2) discrimination; (3) age discrimination; (4) sexual discrimination; (5) harassment, in violation of the Fair Employment and Housing Act (FEHA); (6) wrongful termination, in violation of FEHA and public policy; (7) failure to prevent workplace discrimination; (8) intentional infliction of emotional distress; (9) negligent infliction of emotional distress; (10) defamation; and (11) breach of contract. The Trial Court ordered the complaint and service of the summons be quashed because the Trial Court lacked jurisdiction over Morongo, due to Morongo being "immune to unconsented" lawsuits, and not having consented to Employees' suit. Therefore, the Trial Court ordered the Employees' lawsuit dismissed in its entirety without leave to amend.

On appeal Employees contended the Trial Court erred because 28 U.S.C. § 1360 abrogated Morongo's sovereign immunity in relation to civil claims. Second, in

the alternative, Employees asserted the Trial Court erred because, in Morongo's 2008 Amended Compact with the State of California, Morongo expressly agreed to waive its sovereign immunity in relation to bodily injury, property damage, or personal injury arising out of operating the casino. Third, Employees asserted the Trial Court erred by (a) preventing Employees from petitioning the court for an order compelling arbitration, and (b) not ordering the parties to participate in arbitration. Morongo and the individual defendants specially appeared at the Trial Court, moving the court to quash the complaint and service of summons because "Morongo Band is a federally-recognized American Indian tribe [citation] that is immune from unconsented suit and has not consented either to the creation of the purported causes of action alleged against it or to this Court's jurisdiction to adjudicate those purported causes of action against any of the defendants" Morongo asserted the individual defendants were sued in their official capacities, and thus were "cloaked with the Morongo Band's sovereign immunity," and therefore were also not subject to the Trial Court's jurisdiction. Morongo argued that it could only be subject to the Trial Court's jurisdiction if it expressly waived its sovereign immunity, and no waiver was made that would allow for jurisdiction in Employees' lawsuit. The appellate affirmed the judgment.

77. *Mastro v. Seminole Tribe of Florida*, No. 13-13886, 2014 WL 4085819, 578 Fed. Appx. 801 (11th Cir. 2014). Stephanie Mastro appealed the District Court's dismissal of her amended complaint for lack of subject matter jurisdiction and failure to state a claim. Ms. Mastro, formerly employed as a card dealer at Seminole Indian Casino—Immokalee, sued the Seminole Tribe of Florida, d/b/a Seminole Indian Casino—Immokalee, for gender discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964 and the Florida Civil Rights Act. The Tribe moved to dismiss, arguing that Ms. Mastro failed to state a claim and that the District Court lacked subject matter jurisdiction because the Tribe and Casino were entitled to tribal immunity. The District Court agreed and granted the Tribe's motion. It held that, because Congress did not abrogate tribal immunity with regard to Title VII, sovereign immunity barred Ms. Mastro's claims against the Tribe. It likewise extended this logic to shield the Casino; it concluded that because it was wholly owned, operated by the Tribe, and formed pursuant to the Indian Gaming Regulatory Act, the Casino constituted a subordinate arm of the Tribe and was therefore immune from suit. The District Court's dismissal of Ms. Mastro's complaint was affirmed.

78. *Outsource Services Mgmt, LLC v. Nooksack Bus. Corp.*, No. 88482-0, 2014 WL 4108073, 181 P.3d 272 (Wash. 2014). Washington State courts have jurisdiction over civil cases arising on Indian reservations as long as they do not infringe on the sovereignty of the tribe. At issue in this case is whether Washington State courts have jurisdiction over a civil case arising out of a contract in which the tribal corporation waived its sovereign immunity and consented to jurisdiction in Washington State courts.

Nooksack Business Corporation (Nooksack), a tribal enterprise of the Nooksack Indian Tribe, signed a contract with Outsource Services Management LLC to finance the renovation and expansion of its casino. The contract contained a clause related to sovereign immunity and jurisdiction.

Outsource and Nooksack executed three successive forbearance agreements, but after Nooksack failed to make required payments, Outsource filed suit in Whatcom County Superior Court for breach of the loan agreement. Nooksack acknowledged that it had waived sovereign immunity but argued that nonetheless, Whatcom County Superior Court did not have subject matter jurisdiction over the case because it involved a contractual dispute with a tribal enterprise that occurred on tribal land. The Trial Court denied Nooksack's motion to dismiss, ruling that it had subject matter jurisdiction because Nooksack both waived sovereign immunity and consented to the jurisdiction of Washington State courts. The Trial Court also certified its order for interlocutory appeal. Nooksack appealed, and the Court of Appeals found that review of the jurisdictional issue was justified. The Court of Appeals issued a broader holding than the Trial Court, concluding that the waiver of sovereign immunity alone was sufficient to give the Superior Court subject matter jurisdiction in the case. Nooksack petitioned for review, which was granted. The Supreme Court addressed the broad scope of the Court of Appeals opinion, which held that Nooksack's waiver of sovereign immunity was enough – in and of itself – to confer subject matter jurisdiction on Washington State courts.

Such a broad holding is not necessary to resolve this case, where Nooksack both waived sovereign immunity and consented to state court jurisdiction. The issue of whether state court jurisdiction can be based solely on a waiver of sovereign immunity is not presented in this case, and thus we take no position on it. The Court found that Nooksack consensually entered into a contract in which it waived sovereign immunity and consented to the jurisdiction of Washington State courts. It held that State Court jurisdiction does not infringe on tribal sovereignty. The Court affirmed the Court of Appeals.

K. Sovereignty, Tribal Inherent

79. *North Cent. Elec. Co-op., Inc. v. North Dakota Pub. Serv. Comm'n, et al.*, No. 20130075, 837 N.W. 2d 138, 2013 WL 4714327 (N.D. 2013). Electric utility appealed order of the Public Service Commission, dismissing utility's complaint challenging competing electric utility's extension of electric service to a facility owned by Indian tribe on tribal trust land within Indian reservation. The District Court affirmed the Commission order, and utility appealed. The Supreme Court held that Commission lacked authority to regulate the tribe's decision to have competing utility provide electric service to a tribal-owned facility on tribal-owned land within the reservation. Affirmed.

80. *St. Isidore Farm LLC, et al. v. Coeur d'Alene Tribe of Indians, et al.*, No. 2:13–CV–00274, 2013 WL 4782140 (D. Idaho 2013). Plaintiffs St. Isidore Farm, LLC and Gobers, LLC asked the Court to enjoin and restrain the Coeur d'Alene Tribe of Indians and the Coeur d'Alene Tribal Court from levying civil fines, placing liens on the real property owned by Plaintiff St. Isidore Farm LLC and pursuing criminal actions against the Plaintiffs for the land application of domestic sewage sludge (septage) to non public contact sites from which there is no discharge into waterways. Plaintiffs alleged they are in compliance with all federal and state regulations for the discharge of septage and received approval from the Idaho Department of Environmental Quality for human waste application on the non-Indian fee land. It is undisputed that the Tribe adopted a resolution on March 6, 2013, enacting Chapter 57 of the Coeur d'Alene Tribal Code entitled "Tribal Waste Management Act" which appears to prohibit the septage disposal process being used by Plaintiffs. Plaintiffs argued the Tribe's more restrictive discharge provisions were not applicable to non Indian land owned by non Indians located within the boundaries of the Coeur d'Alene Reservation. Plaintiffs alleged they were being fined by the Tribe for their actions and were facing criminal liability as well as liens being placed on their property for not being in compliance with the Tribe's laws and regulations. Plaintiffs filed a motion for injunctive relief in this Court to enjoin the defendants from attempting to enforce Tribal ordinances against them. The Tribe filed suit in Tribal Court against the Plaintiffs on June 3, 2013. Plaintiffs appeared and answered the Complaint in Tribal Court, but contest the Tribal Court's jurisdiction over this matter. Defendants filed declarations indicating that no criminal prosecutions have been initiated against Plaintiffs. The Court granted defendants' Motion to Dismiss as Plaintiffs must first exhaust their claims in Tribal Court before coming to Federal Court. The Court found that the matter is administratively terminated with leave granted to the parties move to reopen this matter if the Tribal Court determines it does not have jurisdiction over the actions.

81. *In re Estate of Gopher*, No. DA 12–0719, __ P.3d __, 2013 WL 5205233 (Mont. 2013). Son of mother, an enrolled member of Indian tribe who died intestate, filed application for informal probate proceedings. Son's siblings filed motion to dismiss, asserting that jurisdiction over the matter lay with the Tribal Court. The District Court denied motion and imposed a constructive trust on mother's estate. Siblings appealed. The Supreme Court held that District Court's assumption of subject matter jurisdiction over mother's estate did not unlawfully infringe on tribe's right of tribal self-government. Affirmed.

82. *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, No. 13-35003, 2013 WL 6284359 (9th Cir. 2013). Property owner, contractor, and subcontractor commenced action against Indian tribe, seeking declaratory judgment that tribal court lacked jurisdiction over his construction of single family dwelling within reservation and

preliminary injunction barring further tribal court proceedings against them. The District Court, 2012 WL 6651194, dismissed action. Plaintiff appealed. The Appellate Court held that: (1) construction of single-family house on land owned in fee simple by non-Indian in area that already had seen comparable development on reservation did not threaten or have any direct effect on political integrity, economic security, or health or welfare of tribe and (2) construction did not pose catastrophic risks, and thus tribe did not have authority over nonmember's construction. Affirmed in part, reversed in part, and remanded.

83. *Belcourt Pub. School Dist. v. Davis*, Nos. 4:12-cv-114, 4:12-cv-115, 4:12-cv-116, 4:12-cv-117, 4:12-cv-118, 2014 WL 458075 (D.N.D. 2014). A number of lawsuits have been commenced against the Belcourt Public School District ("School District") and its employees in Turtle Mountain Tribal Court. The Turtle Mountain Tribal Court of Appeals has concluded that jurisdiction properly lies in tribal court. The School District commenced actions, seeking a declaration that the tribal court lacks jurisdiction over the School District and its employees. The limited jurisdictional issue before this Court was whether a state political subdivision may be subjected to suit in a tribal forum when it enters into a consensual agreement with a tribe to operate a high school on tribal trust land. The Court found that *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981) is inapplicable when determining the adjudicatory authority over nonmembers who consensually agree to operate and conduct business in conjunction with the tribe on tribal trust land. Even if *Montana* applies, the result would be the same. The "first exception" in *Montana* allows tribal courts to exercise jurisdiction when a nonmember has entered into a consensual relationship with a tribe or its members, through commercial dealing, contracts, leases, or other arrangements. This case fits squarely within the plain language of the exception. The Court denied Plaintiffs' motions for summary judgment and remanded the cases to the Turtle Mountain Tribal Court for consideration on the merits.

84. *Fort Yates Public School Dist. No. 4 v. Murphy ex rel. C.M.B.*, No. 1:12-cv-135, 2014 WL 458054, 997 F. Supp. 2d 1009 (D.N.D. 2014). Plaintiff Fort Yates Public School District #4 ("School District") filed a Complaint against Jamie Murphy for C.M.B. (a minor) and Standing Rock Sioux Tribal Court seeking declaratory relief in the form of an Order declaring that the Standing Rock Sioux Tribal Court lacked jurisdiction over public school districts and school district employees acting in their official capacity, and an injunction prohibiting tribal court from adjudicating the claims brought against the school by Jamie Murphy on behalf of her daughter C.M.B. Pending before the Court was a motion by defendant Jamie Murphy to dismiss the action under Fed.R.Civ.P. 12(b)(7). The limited jurisdictional issue before the Court was whether a state political subdivision may be subjected to suit in a tribal forum when it enters into a consensual agreement with a tribe to operate a school on tribal trust land. The Court

found that *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981) was inapplicable when determining the adjudicatory authority over nonmembers who consensually agreed to operate and conduct business in conjunction with the tribe on tribal trust land. Even if *Montana* applied, the result would be the same. The “first exception” in *Montana* allowed tribal courts to exercise jurisdiction when a nonmember entered into a consensual relationship with a tribe or its members, through commercial dealing, contracts, leases, or other arrangements. The Court found that Standing Rock Sioux Tribal Court has jurisdiction to adjudicate claims against the School District, whether the framework set forth in *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981) applied or not and that the record was sufficiently developed to decide the jurisdictional issue. The Court dismissed the action and remanded the case to the Standing Rock Sioux Tribal Court for consideration on the merits. Jamie Murphy’s motion to dismiss under Rule 12(b)(7) was dismissed as moot.

85. *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, No. 12–60668, 2014 WL 994936, 746 F.3d 167 (5th Cir. 2014). (From the opinion.) The Court previously issued its opinion in this case on October 3, 2013. *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 732 F.3d 409 (5th Cir. 2013). We hereby withdraw the previous opinion and substitute the following. Dolgencorp, Inc. and Dollar General Corp. (collectively “Dolgencorp”) brought an action in the District Court seeking to enjoin John Doe, a member of the Mississippi Band of Choctaw Indians, and other defendants (collectively “the tribal defendants”) from adjudicating tort claims against Dolgencorp in the Choctaw tribal court. The District Court denied Dolgencorp’s motion for summary judgment and granted summary judgment in favor of the tribal defendants, concluding that the Tribal Court may properly exercise jurisdiction over Doe’s claims. Because the Court agreed that Dolgencorp’s consensual relationship with Doe gave rise to Tribal Court jurisdiction over Doe’s claims under *Montana v. United States*, 450 U.S. 544, 564–66 (1981), the Court affirmed the District Court’s judgment.

86. *Las Vegas Tribe of Paiute Indians v. Phebus*, No. 2:13–CV–02000, 2014 WL 1199593 (D. Nev. 2014). After Tribal Court of Appeals ruled that the Indian Tribe lacked criminal jurisdiction over the defendant, who had been a member of the Tribe before being disenrolled, the Tribe brought action seeking declaratory judgment that it could assert criminal jurisdiction over any person satisfying the definition of “Indian” under the Indian Civil Rights Act (ICRA), including the defendant. The defendant failed to appear, and the Tribe moved for summary judgment. The District Court held that: (1) the Indian Tribe had authority to assert criminal jurisdiction over any person qualifying as an Indian under the Indian Civil Rights Act (ICRA), so long as it proved the defendant’s Indian status beyond a reasonable doubt, but (2) the Tribal Court erred in declaring the defendant to be an Indian for purposes of tribal criminal

jurisdiction without submitting the question to a jury for a finding beyond a reasonable doubt. Motion granted in part and denied in part.

87. *Kelsey v. Pope*, No. 1:09–CV–1015, 2014 WL 1338170 (W.D. Mich. 2014). (From the opinion.) The issue in this case was whether a Tribal Court has jurisdiction over a misdemeanor crime between an accused Indian perpetrator, the Petitioner Norbert J. Kelsey, that allegedly occurred during a tribal meeting in a building owned by the tribe but located off the tribe's reservation and wherein the alleged victim was also a tribal member. The Magistrate Judge opined in a Report and Recommendation that tribal courts do not have jurisdiction to prosecute crimes outside of Indian country, and also found that Kelsey's due process rights were violated when the tribal court expanded its jurisdiction in the criminal ordinance. The Court agrees with the Magistrate Judge's conclusion that the tribal courts lacked jurisdiction in this case. This conclusion is supported by Supreme Court precedent, as well as the legislative framework for concurrent jurisdiction in Indian country. Accordingly, the Court granted the Petition for Habeas Corpus.

88. *State v. Lang*, No. 1 CA–CV 12–0629, 2014 WL 1691613, 323 P.3d 457 (Ariz. Ct. App. 2014). State Bar brought action against nonmember, alleging unauthorized practice of law. The Superior Court, Maricopa County, No. CV2009–012054, granted State Bar's motion for summary judgment and entered permanent injunction restraining nonmember from performing acts constituting the practice of law in Arizona. Nonmember appealed. The Appellate Court held that: (1) the nonmember, who had a law degree and was admitted to practice law in tribal court, engaged in unauthorized practice of law in representation of three clients; (2) injunction was not unconstitutionally overbroad in restricting nonmember from maintaining a business address for a law practice anywhere within state of Arizona other than within boundaries of a tribal jurisdiction in which he was admitted to practice; and (3) the injunction was not unconstitutionally overbroad in barring nonmember from referring to himself as a "J.D." or "attorney" and required him to disclaim State Bar membership in his letterhead and advertising material. Affirmed.

89. *Billie v. Stier*, No. 3D13–3180, 2014 WL 1613661(Fla. Dist. Ct. App. 2014). (From the opinion.) "This Petition for a Writ of Prohibition evolves out of a custody dispute between the mother, who was a member of the Miccosukee Tribe of Indians, and the father, who was not a member of the tribe or of Native American heritage. The issue was whether the Miccosukee Tribal Court or the Circuit Court of the Eleventh Judicial Circuit had the jurisdiction to decide the custody dispute. The mother petitioned for a writ prohibiting the Circuit Court from exercising jurisdiction over the custody matter. Based on the facts of this case and the Uniform Child Custody, Jurisdiction, and Enforcement Act ("UCCJEA"), the Court concluded that the Circuit

Court was correct in determining that it, and not the Tribal Court, has jurisdiction to decide the custody issues and we therefore deny the petition.

90. *Simmonds v. Parks*, No. S–14103, 2014 WL 3537863, 329 P.3d 995, (Alaska 2014). A father, whose parental rights were terminated by the Minto Tribal Court, filed a complaint with the Alaska Superior Court requesting physical custody of child. The Superior Court concluded that the Minto Tribal Court's judgment was not entitled to full faith and credit because the father had been denied minimum due process. Foster parents filed petition for review. The Supreme Court granted the petition and remanded the case. On remand, the Superior Court concluded that it was not harmless error for the Minto Tribal Court to have failed to provide a meaningful opportunity for father to challenge Minto's jurisdiction over him. Foster parents filed petition for review. The Supreme Court held that: (1) because the father failed to exhaust available tribal court remedies by appealing to the Minto Court of Appeals, the father was not permitted to relitigate his minimum due process and jurisdictional claims, and therefore, the Supreme Court would accord full faith and credit to the Minto Tribal Court's judgment terminating father's parental rights, and (2) the Indian Child Welfare Act's (ICWA) full faith and credit mandate applied to the Minto Tribal Court's order which terminated the parental rights of parents of Indian child.

91. *Jackson v. Payday Financial, LLC*, No. 12–2617, 2014 WL 4116804, 764 F.3d 765 (7th Cir. 2014). Deborah Jackson, Linda Gonnella, and James Binkowski (collectively "the Plaintiffs") initially brought this action in Illinois state court against Payday Financial, LLC, and other defendant entities owned by, or doing business with, Martin A. Webb, an enrolled member of the Cheyenne River Sioux Tribe. The Plaintiffs alleged violations of Illinois civil and criminal statutes related to loans that they had received from the Loan Entities. After the Loan Entities removed the case to the District Court, that court granted the Loan Entities' motion to dismiss for improper venue under Federal Rule of Civil Procedure 12(b)(3). It held that the loan agreements required that all disputes be resolved through arbitration conducted by the Cheyenne River Sioux Tribe on the Cheyenne River Sioux Tribe Reservation, located within the geographic boundaries of South Dakota. The Plaintiffs timely appealed. Following oral argument, the Appellate Court ordered a limited remand to the District Court for further factual findings concerning (1) whether the tribal law was readily available to the litigants and (2) whether the arbitration under the auspices of the Cheyenne River Sioux Tribe, as set forth in the loan documents, was available to the parties. The District Court concluded that, although the tribal law could be ascertained, the arbitral mechanism detailed in the agreement did not exist. Based on these findings, the Court concluded that the Plaintiffs' action should not have been dismissed because the arbitral mechanism specified in the agreement is illusory. The Court cannot accept the Loan Entities' alternative argument for upholding the District Court's dismissal: that the loan

documents required any litigation to be conducted by a tribal court on the Cheyenne River Sioux Tribe Reservation. As the Supreme Court explained most recently in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 128 S. Ct. 2709, 171 L. Ed. 2d 457 (2008), tribal courts have a unique, limited jurisdiction that does not extend generally to the regulation of nontribal members whose actions do not implicate the sovereignty of the tribe or the regulation of tribal lands. The Loan Entities have not established a colorable claim of tribal jurisdiction, and, therefore, exhaustion in tribal courts is not required. The arbitration provision contained in the loan agreements is unreasonable and substantively and procedurally unconscionable under federal, state, and tribal law. The District Court, therefore, erred in granting the Defendants' motion to dismiss for improper venue based on that provision. Additionally, the courts of the Cheyenne River Sioux Tribe do not have subject matter jurisdiction over the Plaintiffs' claims. Nor have the defendants raised a colorable claim of tribal jurisdiction necessary to invoke the rule of tribal exhaustion. We therefore reverse the judgment of the District Court.

L. Tax

92. *State ex rel. Wasden v. Native Wholesale Supply Co.*, No. 38780, 2013 WL 5642799, 312 P.3d 1257 (Idaho 2013). The state brought an action against an out-of-state Indian-owned wholesaler for operating as a cigarette wholesaler without a permit and for selling cigarettes that were unlawful for sale in Idaho. The District Court enjoined the wholesaler from selling wholesale cigarettes without a wholesale permit and assessed civil penalties. Wholesaler appealed. The Supreme Court held that: (1) the wholesaler was not required to obtain wholesaler permit; (2) the State had subject matter jurisdiction to prevent non-compliant cigarettes from being imported; (3) the Indian Commerce Clause did not preclude regulation; (4) the Trial Court had personal jurisdiction over wholesaler pursuant to long-arm statute; and (5) the exercise of personal jurisdiction comported with due process. Affirmed in part, reversed in part, and remanded.

93. *HCI Distribution, Inc. v. New York State Police*, 2013 WL 5745376 (N.Y. App. Div. 2013). Appeal from a judgment of the Supreme Court, which granted petitioner's application, in a proceeding pursuant to CPLR article 78, to direct immediate release of seized property. Petitioner is an "economic and political subdivision" of a federally recognized Indian tribe located in Nebraska. In January 2012, petitioner purchased, among other things, more than 26,000 cartons of cigarettes and cigars from a manufacturer located on the St. Regis Mohawk Indian Reservation in St. Lawrence County and owned by the St. Regis Mohawk Tribe. The tobacco products were then consigned to a common carrier to be delivered to petitioner in Nebraska. During transport, the truck carrying the cigarettes was stopped at a United States Border Patrol

checkpoint in St. Lawrence County and the Border Patrol authorities contacted the New York State Police. The Court found that inasmuch as petitioner demonstrated neither a clear legal right to the extraordinary remedy of prohibition nor the absence of an adequate alternative remedy, the petition must be dismissed. The judgment was reversed, on the law, without costs, and petition was dismissed.

94. *King Mountain Tobacco Co., Inc. v. Alcohol and Tobacco Tax and Trade Bureau*, No. 11-3038, 2014 WL 267160, 996 F. Supp. 2d 161 (E.D. Wash. 2014). An Indian tribe, tribal corporation, and tribe member brought action seeking declaratory judgment that the corporation was not subject to payment of excise taxes on tobacco products, a declaration that the tribe was entitled to meaningful consultation and resolution of disputes with executive branch, and an injunction prohibiting Alcohol and Tobacco Tax and Trade Bureau (TTB) from preventing sale of corporation's products. United States moved for summary judgment. The District Court held that: (1) the tobacco products were subject to federal excise tax; (2) the 1855 Yakama Treaty did not exempt tribal corporation's manufactured tobacco products from federal excise taxes; and (3) the provision of Internal Revenue Code exempting articles of native Indian handicraft did not exempt manufactured tobacco products. Motion granted.

95. *Smith v. Parker*, No. 4:07CV3101, 2014 WL 558965, 996 F. Supp. 2d 815, (D. Neb. 2014). Owners of businesses and clubs that sold alcoholic beverages brought action against Omaha Tribal Council members in their official capacities for prospective injunctive and declaratory relief from the tribe's attempt to enforce its liquor-license and tax scheme on owners. The state of Nebraska and the United States intervened. Parties cross-moved for summary judgment. The District Court held that the Omaha Reservation was not diminished by the 1882 Act ratifying agreement for sale of tribal lands to non-Indian settlers. The plaintiffs' motion denied; defendants' motion granted.

96. *U.S. v. Puyallup Tribe of Indians*, No. C13-5122, 2014 WL 1386553 (W.D. Wash. 2014). This matter was before the Court on plaintiff United States of America's ("Government") motion for summary judgment and defendant Puyallup Tribe of Indians' ("Tribe") motion for summary judgment. The Government filed a complaint against the Tribe asserting a claim for the alleged failure to honor an Internal Revenue Service ("IRS") Tax Levy. Joshua D. Turnipseed ("Turnipseed") is an enrolled member of the Tribe and owed back taxes to the Government. The Tribe, at the Tribal Council's discretion, distributes per capita payments each month to qualified members such as Turnipseed. The Government issued a levy to the Tribe for Turnipseed's wages, salary, or other income in an attempt to collect Turnipseed's liabilities. The Tribe issued per capita payments to Turnipseed despite the levy, and the Government filed this action. The parties disputed whether the per capita payments were "property" or "rights to

property” and whether the per capita payments were “fixed and determinable” under federal law. The parties also disputed the applicable law (state, tribal, or federal) and the characterization of future per capita payments. The Court granted the Tribe's motion for summary judgment and denied the Government's motion for summary judgment.

97. *Seminole Tribe of Florida v. Florida Dept. of Revenue*, No. 13–10566, 2014 WL 1760855, 750 F.3d 1238 (11th Cir. 2014). An Indian tribe brought an action seeking declaratory judgment that the tribe was exempt from paying state tax on fuel and injunction requiring refund of taxes paid. The District Court, 917 F. Supp. 2d 1255, dismissed the complaint, and the tribe appealed. The Appellate Court held that: (1) the state's sovereign immunity barred action, and (2) the action did not fall within scope of *Ex parte Young* exception to state's Eleventh Amendment immunity. Affirmed.

98. *State, ex rel. Pruitt v. Native Wholesale Supply*, No. 111985, 2014 WL 2620019, 338 P.3d 613 (Okla. 2014). Attorney General initiated proceeding against cigarette importer and distributor, which was a tribally-chartered corporation wholly owned by an individual of Native American ancestry, alleging violations of the Oklahoma Master Settlement Agreement Complementary Act. The importer/distributor filed a motion to dismiss based on lack of personal jurisdiction and subject matter jurisdiction. The District Court denied the motion as to personal jurisdiction, but granted motion upon finding that enforcement of the Complementary Act against importer/distributor would have violated the Indian Commerce Clause, depriving the court of subject matter jurisdiction. Both parties appealed. The Supreme Court, 237 P.3d 199, affirmed in part, reversed in part, and remanded. On remand, the District Court granted summary judgment in favor of the Attorney General. Importer/distributor appealed. The Supreme Court held that: (1) the district court was bound on remand by facts supporting Supreme Court's jurisdictional holdings in previous appeal; (2) the importer/distributor was not entitled to jury trial; and (3) the importer/distributor's actions violated the Oklahoma Master Settlement Agreement Complementary Act. Affirmed.

99. *Westmoreland Resources Inc. v. Dep't of Revenue*, No. DA 13–0547, 2014 WL 3842978, 330 P.3d 1188 (Mont. 2014). Coal producer and Department of Revenue filed joint petition for interlocutory adjudication of substantive question of law, requesting determination as to whether it was proper to have deduction taken from the producer for coal severance and gross proceeds taxes paid to Indian tribe, as owner of coal, to reduce the amount owing under Resource Indemnity Trust and Ground Water Assessment Tax. The First Judicial District Court held in favor of Department. Producer appealed. The Supreme Court held that taxes that producer paid to tribe were not taxes paid on production subject to deduction from contract sales price. Affirmed.

M. Trust Breach and Claims

100. *Klamath Claims Comm. v. U.S.*, No. 2012–5130, 2013 WL 4494383 (Fed. Cir. 2013). The Klamath Claims Committee (KCC) appealed two judgments of the Court of Federal Claims. The first was the Court’s decision to dismiss the third and fourth claims of the KCC’s first amended complaint pursuant to Rule 19 of the Court of Federal Claims. The Appellate Court affirmed that judgment. The second was the Court’s dismissal of the KCC’s motion seeking leave to amend its complaint for the second time. The Court affirmed that decision, but write briefly to address its reasoning for doing so. The Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians comprise one federally-recognized tribal government (the “Tribes”). Pursuant to its constitution and by-laws, the Tribes passed a resolution in 1952 to create the KCC. At that time, the Tribes anticipated the termination of its federal recognition, which later occurred through the Klamath Termination Act of 1954. The KCC’s purpose was to represent the interests of the Tribes’ final enrollees (the “1954 Enrollees”) in claims against the United States filed before and after termination. A “reserve of necessary funds for prosecution” of such claims (the “Litigation Fund”) was created in 1958 from monies due under the Termination Act. In 1986, the Tribes regained federal recognition under the Klamath Indian Tribe Restoration Act. After the federally-recognized sovereignty of the Tribes was restored, the KCC continued to exist. The Tribal Council (the elected governmental body for the Tribes) appears to have supervised the KCC’s post-restoration activities, including the disbursement of money from the Litigation Fund. The present suit began with a complaint filed by the KCC in February 2009. An amended complaint included four claims. The first two alleged wrongdoings by the government related to funds payable to the Tribes and its members under Section 13 of the Termination Act. The third and fourth claims asserted a taking of private property and breach of fiduciary duty arising from the removal of the Chiloquin Dam – an act that allegedly affected water flow and fishing in waterways used by the Tribes. Shortly after the amended complaint was filed, the government moved to dismiss all four claims, arguing that the KCC lacked standing to bring its claims. It asserted that the KCC did not have a legally cognizable interest in the Section 13 funds, the Chiloquin Dam, or the tribal water and fishing rights that were apparently affected by the dam’s removal.

According to the government, the KCC failed to show that “it, instead of the Tribes, [was] the proper entity to assert [its] claims.” Shortly after the KCC filed its motion to amend, the Court of Federal Claims ruled that dismissal under Rule 19 was appropriate because the Tribes was an indispensable party for the third and fourth claims of the amended complaint. In addition to citing concerns and respect for the Tribes’ sovereignty and the risk of “multiple and conflicting claims” against the government, the Court reasoned that the resolution of the third and fourth claims in the amended complaint required adjudication of substantial tribal interests in water and

fishing rights that “might be impaired by an adverse ruling.” The KCC filed a timely appeal. Applying Rule 19 factors here, the Court held that the Tribes were an indispensable party for the claims the KCC sought to add in its motion to amend. The Tribes were clearly a required party for those claims, and the first Rule 19 factor weighed quite heavily in favor of dismissal. The resolution of the KCC’s new claims would necessarily implicate significant sovereign interests of the Tribes and risk substantial prejudice to it.

101. *Fletcher v. United States*, No. 12–5078, 2013 WL 5184985 (10th Cir. 2013). Tribal members brought an action against the federal government, seeking an accounting to determine whether the federal government had fulfilled the fiduciary obligations it chose to assume, as trustee, to oversee the collection of royalty income from oil and gas reserves and its distribution to tribal members. The District Court, 2012 WL 1109090, dismissed the tribal members’ claims, and they appealed. The Appellate Court held that American Indian Trust Fund Management Reform Act imposed on the federal government a duty to provide an accounting of royalty income from oil and gas reserves held in trust and its distribution to tribal members. Reversed and remanded.

102. *Wolfchild, et al. v. U.S.*, Nos. 2012–5035, 2012–5036, 2012–5043, 2013 WL 5405505 (Fed. Cir. 2013). (From the opinion.) The United States currently holds certain tracts of land in Minnesota in trust for three Indian communities. It originally acquired some of that land in the late 1800s, using funds appropriated by Congress to help support a statutorily identified group of Indians, and held it for the benefit of those Indians and their descendants for decades. As time passed, that beneficiary group and the three present-day communities that grew on these lands overlapped but diverged: many of the beneficiary group were part of the communities, but many were not; and the communities included many outside the beneficiary group. In 1980, Congress addressed the resulting land use problems by putting the lands into trust for the three communities that had long occupied them. Ever since, proceeds earned from the lands—including profits from gaming—have gone to the same three communities. The discrepancy between the makeup of the three communities and the collection of descendants of the Indians designated in the original appropriations acts underlies the present dispute, which was before this court once before. Claimants alleged that they belonged to the latter group and that they, rather than the communities, held rights to the land at issue and any money generated from it. Four years ago, based on an extensive analysis of the relevant laws and history, the Court rejected what was then the only live claim, which got to the heart of their assertion: that the appropriations acts created a trust for the benefit of the statutorily designated Indians and their descendants. *Wolfchild v. United States*, 559 F.3d 1228 (Fed. Cir. 2009). On remand, claimants advanced several new claims, some of which seek proceeds generated from the lands, others of which seek more. Again unable to find that claimants have stated a

claim that meets the standards of governing law, we now reject these new claims, including the one that the Court of Federal Claims held valid in the judgment the Courts reviewed. We therefore reversed the Claims Court's judgment against the United States on the claim to pre 1980 money and affirmed its judgment against claimants on the remainder of the proposed claims.

103. *Hopi Tribe v. United States*, No. 12–45, 2013 WL 5496957 (Fed. Cl. 2013). Plaintiff, an Indian tribe, brought suit to recover damages for breach of trust. The alleged breach consisted of defendant's supposed failure to ensure that the water supply on the plaintiff's reservation contained safe levels of arsenic. Before the Court was the defendant's motion to dismiss for lack of subject-matter jurisdiction, in which the defendant asserted that the plaintiff failed to identify an applicable fiduciary duty. Plaintiff was a federally recognized Indian Tribe residing on the Hopi Reservation (the "Reservation") in Arizona. Although the land was uninhabitable without drinking water, the public water systems serving villages on the eastern portion of the Reservation contained levels of arsenic higher than what Environmental Protection Agency (EPA) regulations permit. Plaintiff brought this suit claiming that defendant, through the Bureau of Indian Affairs (BIA) committed a breach of trust by failing to provide plaintiff with an adequate supply of drinking water. Plaintiff claimed that defendant's trust duties flowed from an executive order creating the Reservation (the "Executive Order of 1882") and a subsequent Act of Congress incorporating the requirements of that Executive Order by reference (the "Act of 1958"). According to plaintiff, by establishing the Reservation and holding the land in trust, the Executive Order of 1882 and the Act of 1958 created a duty on the part of defendant to protect the trust property, including the Reservation's water supply. Plaintiff asserted that defendant breached this duty by failing to ensure that the arsenic level in the water supply complied with EPA standards. Defendant filed a motion to dismiss the complaint for lack of subject-matter jurisdiction, contending that plaintiff failed to identify a source of law creating a legally enforceable duty, requiring defendant to provide a certain quality of drinking water to the Reservation.

According to defendant, neither the Executive Order of 1882 nor the Act of 1958 imposes such a duty. Defendant conceded that it held plaintiff's water rights in trust but argues that this general trust relationship does not suffice to establish a specific trust duty to maintain water quality. Defendant also argued that the sources of law plaintiff identified in its complaint cannot "fairly be interpreted" as mandating compensation. Finally, defendant averred that that Congress has provided a civil remedy for violations of the Safe Drinking Water Act and that the Court ought not interpret a statute or regulation to be money-mandating where, "Congress has provided an alternative remedy for the alleged wrongful conduct." The Court found that neither the Executive Order of 1882 nor the Act of 1958 expressly imposed a duty on defendant to protect the

quality of plaintiff's water supply and that because the plaintiff failed to clear the first "hurdle" in establishing this Court's jurisdiction, the Court need not consider whether any provision plaintiff cited can "fairly be interpreted" as mandating compensation.

The Court granted the defendant's motion to dismiss for lack of subject-matter jurisdiction.

104. *Beattie v. Smith*, No. 13–3053, 2013 WL 5995621 (10th Cir. 2013). After being arrested at a resort operated by Native American tribe and charged with lewd and lascivious behavior and disorderly conduct, arrestee was tried and acquitted in state court, and subsequently brought civil rights action against the tribe, its Tribal Police Department, certain tribal police officers and resort security personnel, asserting claims under § 1983 and Kansas law. The District Court granted tribal entities' motion to dismiss and granted the individual defendants' motion for judgment on the pleadings. Arrestee appealed. The Appellate Court held that: (1) the tribal police officers had probable cause to arrest; (2) the arrestee's state law claim that officers' investigation before arresting him was inadequate was barred by discretionary function exception of Kansas Tort Claims Act; (3) the allegation that security personnel caused officers to conduct an abbreviated investigation, leading to arrest, was insufficient to support claim for false arrest under Kansas law; (4) the allegation that security personnel "expressly requested [his] arrest" by officers was insufficient to support claim for false arrest against security personnel under Kansas law; and (5) the allegation that security personnel possessed information that tended to discredit the witness's claim that she saw him masturbating in front of hotel window, but never requested that officers drop criminal case against him, was insufficient to support claim for malicious prosecution against security personnel under Kansas law. Affirmed.

105. *Loya v. Gutierrez*, No. 32,405, 2013 WL 6044354, 319 P.3d 656 (N.M. Ct. App. 2013). Arrestee brought a § 1983 action against a tribal police officer, alleging false arrest, malicious prosecution, and excessive force. Officer filed third-party declaratory judgment action against the county, alleging the county was required to defend and indemnify him. The District Court granted summary judgment for the county. Officer appealed. The Appellate Court held that: (1) the officer was not law enforcement officer under the Tort claims Act, and (2) the officer was not a public employee. Affirmed.

106. *Wyandot Nation of Kansas v. United States*, No. 06–919, 2014 WL 1379106, 115 Fed. Cl. 595 (Fed. Cl. 2014). Before the Court was the defendant's motion to dismiss for lack of subject-matter jurisdiction, pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims. The government argued that the pendency of a previously filed case in a U.S. District Court precluded the Court's

jurisdiction under 28 U.S.C. § 1500. On December 28, 2006, plaintiff, Wyandot Nation of Kansas (Wyandot Nation), brought a claim in the Court of Federal Claims against the government. Plaintiff sought money damages to compensate it for various breaches of fiduciary duty that it claimed the government committed as trustee of a trust holding assets for its benefit. On December 30, 2005, before filing its action in the Court of Federal Claims, plaintiff filed a case in the United States District Court for the District of Columbia seeking relief for the government's alleged breach of fiduciary duty in connection with the same trust. On July 13, 2006, the plaintiff filed an amended complaint in the District Court alleging defective trust accounting. In the District Court, the plaintiff sought declaratory and injunctive relief to compel a proper accounting and injunctive relief to compel proper management of its trust accounts. Several months later, the plaintiff brought its claim against the United States for money damages in the Court of Federal Claims. Plaintiff sought consequential damages, incidental damages, compound interest, pre-judgment interest, court costs, and attorneys' fees – all related to the defendant's breach of the fiduciary duties outlined above. The Court concluded that the plaintiff's previously-filed district court complaint contained operative facts which substantially overlapped those of the above-captioned case and that § 1500 precluded the Court's jurisdiction. The Court granted the government's motion to dismiss.

107. *Stockbridge-Munsee Cmty v. New York*, No. 13–3069, 756 F.3d 163, 2014 WL 2782191 (2d Cir. 2014). An Indian tribe brought an action against the State of New York and certain state officials and agencies, counties, towns, and villages, alleging the tribe, and not the State, had title to 36 square mile tract of land in upstate New York. The District Court, 2013 WL 3822093, granted the defendants' motions to dismiss, and the tribe appealed. The Appellate Court held that equitable principles of laches, acquiescence, and impossibility barred tribe's claims. Affirmed.

108. *Winnemucca Indian Colony v. United States*, No. 13–874, 2014 WL 3107445 (Fed. Cl. 2014). Before the Court was an action for breach of trust brought by plaintiffs, Winnemucca Indian Colony and Chairman Willis Evans (the Colony). Defendant, the United States, (government) moved to dismiss the complaint. In their complaint, plaintiffs alleged that the United States has committed a breach of trust and a breach of fiduciary duty in connection with actions taken by the United States Bureau of Indian Affairs in failing to recognize the Colony's tribal government and, inter alia, for allowing non-Colony members to occupy and use Colony land. As a result of these alleged breaches, plaintiffs sought \$108,000,000 and a declaratory judgment entitling the Colony to past, present, and future compensation, among other relief. In August 2011, the Winnemucca Colony filed a case against the United States in the United States District Court for the District of Nevada that raised similar claims. The Court agreed with the government that § 1500 bars the Court from considering Counts One, Two, and Three of plaintiffs' complaint and that Counts Three and Four also must be

dismissed as seeking relief outside the jurisdiction of the court. The government's motion to dismiss the complaint was granted.

N. Miscellaneous

109. *Gabrielino-Tongva Tribe v. St. Monica Dev.*, No. B238603, 2013 WL 5976240 (Cal. Ct. App. 2013). In 1994, the Gabrielino–Tongva people were recognized by the State of California as “the aboriginal tribe of the Los Angeles Basin.” Currently in California there are several associations of descendants of this historic Native American tribe. This appeal concerned two different groups of people claiming the right to control one such association, the Gabrielino–Tongva Tribe. One of these two factions (appellant) initiated the lawsuit against defendants (respondents); the other tribal entity settled the claims against defendants. Defendants moved for summary judgment based on that settlement. The Trial Court determined there was no triable issue of material fact concerning the authority of the settling faction to act on behalf of the Tribe and entered judgment for defendants. The Appellate Court determined there were triable issues of material fact preventing a summary disposition of the matter. The Appellate Court reversed the judgment and the order granting respondents’ motion for summary judgment.

110. *W.I.H. ex rel. Heart v. Winner School Dist. 59-2*, No. CIV 06–3007 (D.S.D. 2014). Plaintiffs instituted this action contending that the defendants punish Native American students more harshly and more frequently than similarly situated Caucasian students, that the defendant District maintains a racially hostile educational environment, and engages in racially discriminatory policies, customs, and practices. This matter was certified as a class action pursuant to Fed.R.Civ.P. 23 on behalf of the following class of plaintiffs: All Native American students currently enrolled or who will in the future enroll in Winner Middle School or Winner High School. Class counsel and counsel for the defendants filed a joint motion for approval of a settlement and proposed consent decree. Notices of the proposed settlement and of a fairness hearing were given to the class members. A consent decree was entered on December 10, 2007. Counsel filed a joint motion for approval of an amended consent decree. Notices of the proposed amended consent decree and of a fairness hearing were given to the class members. No objections were filed. The original consent decree set forth a plan for developing and implementing certain “benchmarks,” i.e., programs or objectives designed to remedy the claimed hostile environment at the Winner Schools. The original consent decree was to remain in effect until the defendants complied with all benchmarks for four consecutive school years, at which time the decree would automatically terminate. The benchmark committee met in May and July of 2013, and determined that the benchmarks should be revised. The parties have agreed to amend the original consent decree to refer to “benchmarks” as “actions,” and “item goals” as

“outcome measures.” The proposed amendment to the consent decree was contemplated by the original consent decree as part of continuing monitoring of the District's compliance and the parties desire to remedy the conditions existing at the time the class action was filed. The amendments are consistent with the original consent decree's purpose. The amended consent decree is fair, reasonable, and adequate to continue to redress the claims of current and future class members and is approved.

111. *First Citizens Bank & Trust Co. v. Harrison*, Nos. 43451-2-II, 43751-1-II, 2014 WL 2547601 (Wash. Ct. App. 2014). Lender brought breach of contract action against borrowers for failure to pay promissory note based on a line of credit. The Superior Court granted summary judgment in favor of lender in the amount of \$161,831.97, but ruled that the borrower's personal bank account containing proceeds from the sale of her Indian trust land were exempt from garnishment. Lender appealed. The Appellate Court held that: (1) the lender was judicially estopped from arguing on appeal that borrowers failed to prove the factual basis for their exemption, i.e., that the funds in the Native American borrower's bank accounts derived from leases of Indian trust land; (2) the Superior Court had the jurisdiction to resolve the issue of whether the statute excluded proceeds from the sale of Indian trust land, from liability for the payment of a debt that arose during the trust period, continued to protect any such moneys that had been placed in a Native American's personal bank account; (3) the federal statute that provided that moneys from the lease or sale of Indian trust lands was not liable for certain debts provided protection against the garnishment of the money in the borrower's bank accounts that had accrued from the lease of borrower's Indian trust lands, regardless of whether the moneys accrued to an Individual Indian Money (IIM) account or directly to the Native American borrower; and (4) the lender was entitled to recover its attorney fees and costs incurred in responding to borrowers' appeal. Affirmed.

112. *Pederson v. Arctic Slope Regional Corp.*, No. S-15056, 2014 WL 3883431, 331 P.3d 384 (Alaska 2014). Arctic Slope Regional Corporation is an Alaska Native Regional Corporation organized under the Alaska Native Claims Settlement Act and AS 10.06.960 and incorporated under the Alaska Corporations Code, AS 10.06. At the time of trial, the Corporation took in about \$2.5 billion in revenue each year, employed about 10,000 people, and had operations across the country and around the world. The Corporation had about 11,000 shareholders in 2012, about 6,000 of whom were adults holding voting shares. Rodney Peterson is an original shareholder of the Corporation, holding 100 Class A shares. An attorney and a member of the Alaska bar, Pederson worked as assistant corporate counsel to the Corporation and later as an executive for one of the Corporation's subsidiaries. The employment relationship soured. Pederson sought to exercise his statutory right to inspect books and records of account and minutes of board and committee meetings relating to executive

compensation and an alleged transfer of equity in corporate subsidiaries to executives. The Corporation claimed that the materials were confidential and sought to negotiate a confidentiality agreement prior to release of any documents. This appeal presented several issues of first impression in Alaska.

The court held that (1) the statutory phrase “books and records of account” includes electronically maintained books and records of account; (2) the statutory phrase also goes beyond mere annual reports and proxy statements; and (3) the statutory phrase at least encompasses monthly financial statements, records of receipts, disbursements and payments, accounting ledgers, and other financial accounting documents, including records of individual executive compensation and transfers of corporate assets or interests to executives. The Court further held that (4) the statutory category “minutes” does not encompass all presentations or reports made to the board but rather merely requires a record of the items addressed and actions taken at the meeting, as have been faithfully recorded after the meeting. Finally, the Court held that (5) a corporation may request a confidentiality agreement as a prerequisite to distributing otherwise-inspectable documents provided that the agreement reasonably defines the scope of confidential information subject to the agreement and contains confidentiality provisions that are not unreasonably restrictive in light of the shareholder’s proper purpose and the corporation’s legitimate confidentiality concerns. The Court concluded that the Corporation’s proffered confidentiality agreement in this case was not sufficiently tailored or limited in scope and thus Pederson’s refusal to sign it could not serve as a legal basis for avoiding liability for denying his inspection claims. The Appellate Court reversed the Superior Court’s judgment, vacated the Superior Court’s findings of fact and conclusions of law, and remanded for further proceedings consistent with this opinion.